United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL WITH PROOF OF SERVICE

76-7314

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff-Appellant-Appellee,

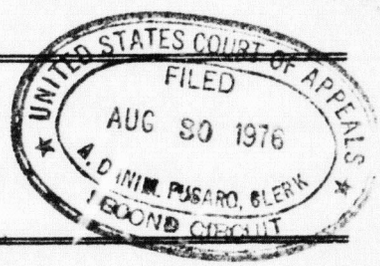
P/S

v.

AMTRACO CORPORATION,

Defendant-Appellee-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AFTER TRIAL



JOINT APPENDIX

FOX GLYNN & MELAMED
Attorneys for Plaintiff-Appellant-Appellee
299 Park Avenue
New York, New York 10017
(212) 593-6600

LIEBMAN, EULAU, ROBINSON & PEARLMAN
Attorneys for Defendant-Appellee-Appellant
32 East 57th Street
New York, New York 10022
(212) EL 5-5522

(5659A)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

PAGINATION AS IN ORIGINAL COPY

INDEX TO JOINT APPENDIX

		Page
Docket Sheet		A-1
Complaint		A-4
Answer		A-7
Transcript of Testimony at Trial		A-10
Plaintiff's Witnesses:		
Hans Theo Baumann	Direct	A-17
	Cross	A-35
Fabio Bohorquez	Direct	A-58
	Cross	A-72
Joseph S. Silver	Direct	A-79
Ricardo Jove	Direct	A-84
Defendant's Witnesses:		
Joseph S. Silver	Direct	A-112
Victor S. Najda	Direct	A-116
	Cross	A-131
Memorandum and Order of the District Court (January 27, 1976)		A-139
Defendant's Notice of Motion Pursuant to Rules 52 and 59, F.R.C.P.		A-146
Affidavit of Lawrence M. Rosenstock in support of Defendant's motion pursuant to Rules 52 and 59, F.R.C.P.		A-148
Amended Opinion of the District Court (May 20, 1976)		A-160
Judgment (June 1, 1976)		A-167
Plaintiff's Notice of Appeal		A-169
Defendant's Cross Notice of Appeal		A-170

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE KNAPP

A-1

Jury demand date:

72 CIV. 2441

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
[illegible] AGAINST, [illegible] CORPORATION	For plaintiff: FOX, GLYNN & [illegible] ~~230 East 42nd St.~~ N.Y.C. N.Y. 10017 299 Park Avenue N.Y.C. 10017 7/9 For defendant: Liebman Eulau, Robinson & Pearlman 32 East 57th Street NYC 10022 EL 5 5522

BEST COPY AVAILABLE

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 6 mailed X	Clerk		6/7/72	Fox, Glynn	NT	
			6/9/72	U S Treas	—	NT —
06-01-76						
J.S. 6 mailed [illegible] 2/17/77	Marshal					
Basis of Action: BREACH OF CONTRACT. $114,526.99	Docket fee					
	Witness fees					
Action arose at: [illegible]	Depositions					

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT VS. AMTRACO CORP. JUDGE KNAPP

72 CIV. 244

A-2

DATE	PROCEEDINGS	Date Order Judgment N
7-72	FILED COMPLT. ISSUED SUMMONS.	
ul 11-72	Filed summons with marshal's ret. Served Amtraco Corp. by Secretary of Amtraco Corp. on 6/21/72.	
Jul 17-72	Filed JUDGMENT. DEFAULT Ordered that pltf. Bank Fur Gemeinwirtschaft Aktiengelsellschaft have judgment against deft. Amtraco Corp. in the sum of $118,669.98, tog. with int. in the amt. of $3,589.58, and costs of $38.36 (Total $122,297.92). Clerk. DOCKETED AS JUDGMENT NO. 72,718 on 7/17/72. Ent. 7/18/72. (mailed notice)	
July 28	Issued Execution. Judgment #72.718.	
Aug.2-72	Filed OPEN DEFAULT BOND ($123,583.40 Fidelity and Deposit Co. of Maryland)	
Aug.2-72	Filed Order to Show Cause re: Vacate Judgment. Ret. 8/22/72. (attys.for deft-judgt.debt	
Aug 17.72	Filed Stip & Order Vacating Judgmen dated 7/17/72, as indicated. So Ordered Bauman J.	
Aug 25.72	Filed Memo. End. on Order to Show Cause dated 8/2/72. Motion withdrawn. So Ordered Bauman J.	
ep 15.72	Filed ANSWER.	LER&P
Sep.26-72	Filed Affidavit of Raymond F. Steckel in opposition to deft's.motion.	
Sep 28-72	Filed Deft notice of motion. Re: Withdraw Undertaking. Ret 10/3/72	
Oct 27.72	Filed Order. Pending a hearing on motion, that dft. file an undertaking in the amount of $125,000. & that dfts. motion for permission to withdraw the undertaking is accordingly granted/ So Ordered Knapp J. (mailed notice)	
Feb.26-73	Filed Execution against the Property. with marshal's return. Judgment unsatisfied.	
ay.23 74	Filed pltff's affirmation & notice of motion Re: Deposition ret. 5-31-74.	
ay 23-74	Filed pltff's memorandum of law in support of motion ret.5-31-74.	
ay 28-74	Filed deft's affirmation & notice of motion Re: deposition ret.5-31-74	
ay.29 74	Filed Memo-endorsed on pltff's motion filed 5-23-74: Referred to, Magistrate to hear & report. Knapp.J. m/n	
ul.10-74	Filed Order that deft. produce its officer & employee Werner Neumann, for his oral deposition by pltff. In the event the said Werner, Neumann does not appear & submit to deposition, pltff.may move, to compel said Werner Neumann to show cause why he sould not be held in contempt. Knapp.J.	
ul.10-74	Filed Endorsement: Deft's motion for a protective order: Ordered, that this motion is withdrawn with the leave of court. Knapp,J.	
ov.25-74	Filed pltff's affirmation & notice of motion to hold deft's officer in contempt ret.12-6-74.	
Nov.25-74	Filed pltff's memorandum of law in support of his motion ret.12-	
Nov.27-74	Filed Memo-endorsed on motion filed 11-25-74: Motion referred to Magistrate Schreiber to hear & report. Knapp,J.	
ec.5-74	Filed deft's memorandum of law in opposition to motion for sanctions.	
ec.5-74	Filed affirmation by J.I. Klein in opposition to pltff's motion Re: contempt.	
Jan.29-75	Filed memorandum to Knapp,J. from Magistrate Hartenstine, dated 1-23-75	
Jan.29-75	Filed Memorandum to Knapp,J. from " " dated 1-23-75	
Jan.29-75	Filed Order that deft. is precluded from offering any evidence by its officer & employee, Werner Neumann,directly or indirectly at the trial of this action, unless within 30 days from service upon deft's atty of notice of entry of this order, the deft. produces Werner Neumann for his oral deposition by pltff. Deft. shall pay to pltff its costs & expenses for this motion including its attys fee. (Memo-endorsed on order, Order vacated upon receipt of letter dated 1-20-75 & signed by Allan J. Kitschmer. Knapp,J. (2nd memo-endorsed on above order)Order reaffirmed upon receipt of a supplemental report by Magistrate Hartenstine dated 1-23-75. Knapp,J.	

cont'd on page #2

iv 2441 Bank Fur Gemeinwirtschaft Akt, vs. Amtraco Corp. 72 Civ 2441

JUDGE KNAPP A-3

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Or Judgment
eb.21-75	Filed pltff's affirmation & notice of motion Re; Attys fees & costs ret.2-28-75.	
Feb 20-75	Filed notice of entry, order entered 2-18-75.	
eb.27-75	Filed deft's memorandum of law in opposition to motion Re : Attys fees	
pr.3-75	Filed stip & order that deposition of Werner Neumann,witness shall be taken on 4-3-75. So ordered. Knapp,J.	
pr.8-75	Filed Memo-endorsed on pltff's motion filed 2-21-75 Re: attys fees. The motion is referred to Magistrate Hartenstine to hear & report Knapp,J.	
-02-75	Filed deft's request to produce.	
-09-75	Before Knapp,J. Non-Jury trial begun, & concluded. Decision reserved.	
7-29-75	Filed Memorandum & Order #42868: I have decided to adopt the report & recommendation of Magistrate Hartenstine as the order of the court. So ordered. Knapp,J. m/n	
7-29-75	Filed report & recommendation by Magistrate Hartenstine that pltff be awarded $750 as its reasonable expenses, including attys fees, on the underlying motion.	
8-(6-75	Filed transcript of record of proceedings, dated 07-9-75	
-27-76	Filed Memo-Decision & Order #43783: ~~Judgment will accordingly be~~ entered for the difference between the contract price($95,722) & the price offered in deft's exhibit BBB, plus storage charges, ,insurance costs & service charges to American Bank & Trust Co. Pltff. is directed to submit a proposed judgment on ten days notice to deft. The foregoing shall constitute my findings of fact & conclusions of law pursuant to F.R.C.P. 52. So ordered. Knapp,J. m/n	
-26-76	Filed deft's affidavit & notice of motion to amend its findings of fact & conclusions of law ret.3-5-76.	
-26-76	Filed deft's memorandum of law in support of motion ret.3-5-76.	
-11-76	Filed stip & order that deft's motion ret.3-5-76 adj. to 3-19-76. Knapp,J.	
-19-76	Filed pltff's memorandum of law in opposition to deft's motion .	
08-76	Filed deft's reply memorandum of law in support of motion.	
-20-76	Filed Amended Opinion #43783:Deft. has moved for an order amending this court's findings of fact & conclusions of law dated 1-26-76 because of an error made in determining the post-breach market market price of lactose, we reached an incorrect conclusion with respect to pltff's damages. The deft. is directed to prepare an appropriate judgment. Costs are to be borne equally by the respective parties. So ordered. Knapp,J. m/n	
01-76	Filed JUDGMENT -Ordered and Adjudged that deft. Amtraco Corp. is deemed liable to pltff., pltff. shall recover no damages against deft. Amtraco Corp. and each party is to bear its own costs. Knapp,J. m/n Judgment entered 6-1-76 Clerk	
30-76	Filed pltff's notice of appeal to the USCA from judgment ent. 6-01-76. Mailed copy to Liebman,Eulau,Robinson & Perlman.	
09-76	Filed deft's notice of cross-appeal from judgment entered. 6-01-76. Mailed copy to Fox Glynn & Melamed.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(WK)

A-4

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT Plaintiff, -against- AMTRACO CORPORATION Defendant.	72 CIV 2441 Civil Action No. COMPLAINT

PLAINTIFF, by its attorneys, Fox Glynn & Melamed, for its complaint herein, alleges:

I

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a banking corporation organized under the laws of the Federal Republic of Germany, with principal offices located at Mainzer Landstrasse 16-24, Frankfurt am Main, Federal Republic of Germany, and defendant is a corporation organized under the laws of the State of New York with principal offices located at 2 Broadway, New York, New York. The matter in controversy, exclusive of interest and costs, exceeds $10,000.

2. On or about September 30, 1971, plaintiff, through its agent, Molkerei J.A Meggle, a commodities merchant with principal offices in the Federal Republic of Germany, entered into an agreement with defendant, an experienced commodities merchant, by which plaintiff agreed to sell and deliver to defendant 503.8 metric tons of edible lactose and to assume all costs of storage of said edible lactose through October 20, 1971.

3. In consideration of plaintiff's undertaking to sell and deliver said edible lactose at a storage warehouse located in New Jersey and to assume said storage costs, defendant agreed to

pay to plaintiff's agent, American Bank & Trust Company, 70 Wall Street, New York, New York, the sum of $95,722.

A-5

4. On or about October 7, 1971, plaintiff did deliver said edible lactose to defendant, which delivery was accepted by defendant, and did otherwise comply with all terms of said agreement applicable to plaintiff.

5. Although duly demanded to do so, defendant has failed and refused to pay any part of the $95,722 consideration due for the edible lactose purchased by defendant from plaintiff or any part of the storage charges for said edible lactose for the period commencing October 21, 1971.

6. As of May 30, 1972, storage charges on said 503.8 metric tons of edible lactose for the period commencing October 21, 1971, have accrued in an aggregate amount of $18,804.99 and have been paid by plaintiff or its agent for the account of defendant.

7. By reason of the foregoing facts, plaintiff has been damaged in the sum of $114,526.99.

WHEREFORE, plaintiff demands damages of defendant in the amount of $114,526.99, together with all charges paid or accrued by reason of the storage of said edible lactose subsequent to May 30, 1972, together with interest on said sums and costs of this action.

II

AS AND FOR A SECOND CAUSE OF ACTION

8. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 7 of this complaint with the same force and effect as if fully set forth herein.

9. On or about October 7, 1971, defendant, pursuant to its agreement with plaintiff, did execute a Trust Receipt, as Trustee, with American Bank & Trust Company, acting as agent for

plaintiff, acknowledging receipt of warehouse receipts representing said edible lactose and granting to American Bank & Trust Company, for the account of plaintiff, a security interest in said edible lactose.

WHEREFORE, plaintiff demands damages of defendant in the amount of $114,526.99, together with all storage charges on said edible lactose paid by or on behalf of plaintiff subsequent to May 30, 1972, and interest on said sums and costs, but LESS any amounts received by or on behalf of plaintiff in respect of a sale of all or part of said edible lactose pursuant to an exercise of plaintiff's security interest therein.

Dated: New York, New York
June 7, 1972

Raymond F. Steckel
A member of the firm of
Fox Glynn & Melamed
220 East 42nd Street
New York, New York 10017
Tel.: 867-3711

A-7

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

----------x

BANK FUR GEMEINWIRTSCHAFT
AKTIENGESELLSCHAFT,

72 Civ. 2441

Plaintiff,

ANSWER

-against-

AMTRACO CORPORATION,

Defendant.

----------x

Defendant, by its attorneys, Liebman, Eulau, Robinson & Perlman, for its answer to the complaint herein, alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint, except admits that defendant is a corporation organized under the laws of the State of Delaware with principal offices located at 2 Broadway, New York, New York.

SECOND: Denies each and every allegation contained in paragraph 2 of the complaint, except admits that defendant, acting as agent for plaintiff, agreed to receive edible lactose on a sale or return basis, and subject to passing Canadian health authorities.

THIRD: Denies each and every allegation contained in paragraph 3 of the complaint, except admits that defendant agreed to make payment to American Bank and Trust Company when and if defendant resold the goods for plaintiff's account.

FOURTH: Denies each and every allegation contained in paragraph 4 of the complaint.

FIFTH: Denies each and every allegation contained in paragraph 5 of the complaint, except admits that defendant has not paid for the edible lactose, and specifically alleges that defendant is not obligated to make payment therefor.

SIXTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint, except denies that plaintiff or its agent has made payment for the account of defendant.

SEVENTH: Denies each and every allegation contained in paragraph 7 of the complaint.

EIGHTH: With respect to paragraph 8 of the complaint, defendant repeats and realleges its responses to each and every allegation contained in paragraphs 1 through 7 of the complaint with the same force and effect as if fully set forth herein.

NINTH: Denies each and every allegation contained in paragraph 9 of the complaint, except admits that on or about October 7, 1971, defendant executed a document entitled "Trust Receipt" with American Bank and Trust Company.

FOR A FIRST COMPLETE DEFENSE TO
COUNTS I AND II OF THE COMPLAINT:

TENTH: Each and every count of the complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant demands judgment against plaintiff dismissing the complaint herein, together with costs and

disbursements of this action.

Dated, New York, N.Y.,
September 12, 1972.

LIEBMAN, EULAU, ROBINSON & PERLMAN
Attorneys for Defendant

By s/ Julian S Perlman
A Member of the Firm

32 East 57th Street,
New York, N.Y. 10022

Telephone: (212) 355-5522

A-10

Closed 6-1-76

jh:mg 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

BANK FUR GEMEINWIRTHSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

v. 72 Civ. 2441

AMTRACO CORP.,

Defendant.

- - - - - - - - - - - - - - - - - - x

B e f o r e:

HON. WHITMAN KNAPP,
District Judge

New York, New York
July 9, 1975 - 10:00 a.m.

APPEARANCES:

FOX, GLYNN & MELAMED, Esqs.,
Attorneys for Plaintiff,
JOHN R. HORAN, Esq.,
of Counsel

LIEBMAN, EULAU, ROBINSON & PERLMAN, Esqs.,
Attorneys for Defendant
LAWRENCE M. ROSENSTOCK, Esq.,
of Counsel

(Case called)

MR. HORAN: Plaintiff is ready.

MR. ROSENSTOCK: Defendant is ready.

MR. HORAN: Your Honor, will you entertain an opening statement?

THE COURT: Yes.

MR. HORAN: This is an action brought by a bank in Germany, a Frankfurt bank, for damages arising out of an alleged breach of a contract to purchse some inventory, lactose, which is a milk derivative, powdered, and the transactions --

THE COURT: Is lactose powdered milk?

MR. HORAN: It isn't quite. It is an extract of whey which is in turn part of milk. The only realistic thing to bear in mind is that it is a dry powdered substance which was stored here in the United States at the time of the sale.

The plaintiff was acting on the purchase through an agent in Europe, in Germany, who arranged the alleged sale with the defendant, also through an agent of the defendant or through an employee, at least in Europe.

So that the deal was made in Europe. It was to be consummated here in the United States.

The goods under the contract -- title to the

goods were passed by means of a trust receipt here in New York, which happened, and defendant signed the trust receipt, took title to the goods here in New Jersey, and according to the terms of the purchase confirmation, which will be introduced into evidence, payment for these goods was to be made by the defendant after having the goods pass Canadian health authorities.

That is the phrasing in the contract of sale.

The evidence will show that the defendant never presented the goods for inspection in Canada and repudiated the contract, according to the plaintiff, and forced the plaintiff, through its other agent, now the American Bank and Trust Company, which held the trust receipt, to negotiate other sales of these goods, and their documents show a series of smaller sales -- this was a bulk sale of 500 metric tons or so -- smaller sales over the course of several months, and in the meantime storage charges were incurred by the bank, plaintiff, which are specifically under the contract the burden of the defendant to pay, and insurance charges, and eventual customs duties because the sales were made here in the United States.

Customs duties would not have been necessary had the sale been made in Canada because then they just

in effect bypass the United States, even though they were stored here.

So this is really a dispute over whether, first, that piece of paper, the purchase confirmation, is what the plaintiff says it is, a contract of sale, or is it what the defendant alleges in its only defense that I can perceive, is it a sale or return contract, where you take hold and if you can't sell, you return.

It seems clear that it is a straight sale. It is also clear under the uniform commercial code that a sale or return contract means a special, separate written contract and the statute of frauds applies, as does the parol evidence rule.

In the second aspect of the case, assuming liability, the question of how much damage was incurred by this breach of contract is, again, under the code a question of showing, as we will, the negotiated price of sale of these goods after the repudiation by the defendant and the other incidental damages, which were storage charges and customs duties and a fee charged by the American Bank and Trust Company, a company who acted as the bank's agent.

The order of proof will be testimony of the bank's first agent, the European lactose dealer who made

the deal for the bank--

THE COURT: That is Meggle?

MR. HORAN: Meggle. Mr. Baumann has come to testify. Mr. Baumann requires an interpreter. He speaks English, but he would like to have an interpreter.

Then the American Bank and Trust Company records, which are voluminous, but which I have reduced to schedules, which I hope will be understandable.

Then I had anticipated calling as a witness for the plaintiff in plaintiff's case Mr. Neumann of the defendant, who negotiated or signed the contract for the defendant. He does not appear to be present.

Therefore I would call a person of their company who is present.

THE COURT: I assume you have to prove good faith efforts to sell?

MR. HORAN: Yes. That will be demonstrated.

THE COURT: Does the defendant want to say anything at this time?

MR. ROSENSTOCK: Yes, your Honor.

Initially, before I begin, I would also just like to apprise your Honor of the fact that there is an outstanding magistrate's report on discovery sanctions which has just been forwarded to your Honor in the last

few days and I am going to prepare a response to that which I will submit to you during the trial. I just want to apprise you of that.

Essentially it is defendant's position that when they entered into this arrangement with Meggle, the goods had already been in New York and they were anxious to arrange for the disposal because they were located in Germany and they came to Amtraco.

Amtraco agreed to act on their behalf as a middleman to dispose of the goods. It was understood by the parties that Amtraco was in turn going to sell the goods to a Canadian customer and the purchase order specifically provided that payment will be made by Amtraco to American Bank and Trust, which is the agent of the plaintiff in New York, after the goods have passed inspection of the Canadian governmental authorities and upon delivery.

This was the understanding of the purchase order and actually on the same day that this purchase order was signed Amtraco also signed a purchase order with a customer that the parties understood to be in Canada.

Shortly thereafter the Canadian customer informed Amtraco that the man who had signed the purchase order was without authority to do so. I think later on

he was terminated by that company.

The deal fell through, through no fault of Amtraco's. Accordingly, the conditions precedent of the contract were never fulfilled.

Thereafter Amtraco made several offers to attempt to sell the goods again at other places. In each intance the plaintiff refused or insisted that even if they did sell them, they were liable, plaintiff insists that they were liable on the initial contract, and of course Amtraco maintained they were not, and this presented difficulties in attempting to dispose of the goods through Amtraco.

Of course, plaintiff was at all times free to attempt to dispose of the goods in any means they had available to them throughout the period.

But in point of fact what happened is that plaintiff had retained the goods in storage for almost a year and a half after this transaction fell through, and since this was a somewhat perishable commodity, the storage charges were quite large, and in fact I think about 70, 80% of the plaintiff's claimed damages at this point relate to storage charges.

So even assuming that there is any liability, which we deny, I think plaintiff's actions in attempting

to mitigate damages were commercially unreasonable, and Amtraco will also demonstrate that plaintiff could easily have disposed of the goods at any time by other means if they had chosen to do so.

MR. HORAN: Should we proceed, your Honor?

THE COURT: Yes.

Do you understand English well enough to take the oath?

MR. BAUMANN: A little bit. My English is so bad that I appreciate the interpreter.

THE COURT: That makes sense. But you can take the oath anyway.

D O M I N I C C A P E Z Z A was duly sworn to act as interpreter.

H A N S T H E O B A U M A N N, called as a witness by the plaintiff, being first duly sworn, testified through the interpreter, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q Mr. Baumann, by whom are you employed?

A The employer of Mr. Baumann is the Dairy Industry Meggle.

Q How long have you been employed by Meggle?

A I have been working for Meggle since the 1st

of April, 1969.

Q What is the business of Meggle?

A As the name says, Meggle is the milk industry. We produce fresh produccts, like butter and cheese. That is one of our lines.

The other is dry products, such as lactose, casein. We are Europe's largest producer of lactose.

Q Mr. Baumann, what is your present position with Meggle?

A I am the manager of sales of one of the departments and that is general food products.

Q Does that include milk products?

A Yes, naturally.

Q In the year 1971, what was your position at Meggle?

A I was the assistant sales manager.

Q Where were you stationed?

A In the main office, in Reitmehring.

Q Mr. Baumann, I direct your attention to the summer of 1971. Were you at any time during those summer months contacted or called by anyone from Bank Fur Gemeinwirthschaft which, your Honor, if we may refer to as BFG, we will save a great deal.

A Yes, somebody contacted me.

Q In what connection did someone contact you from that bank?

MR. ROSENSTOCK: Your Honor, I would object to any conversations between Meggle and BFG.

THE COURT: This isn't for the truth of the assertions. It is just to establish that conversations were had.

MR. HORAN: Exactly.

THE COURT: Overruled.

A I was informed by the Bank Fur Gemeinwirthschaft that they were the owners of 503.8 metric tons of lactose by Dr. Schuster of the bank.

MR. ROSENSTOCK: I think he is testifying now to a conversation that he had, not just the purpose of the contact.

THE COURT: I assume he is establishing--

MR. HORAN: The relationship between the bank and himself.

THE COURT: I will allow it for that purpose.

Q Did there come a time when Meggle through you agreed to perform services for the bank?

A No.

Q Did there come a time when Meggle through you made an arrangement of any kind with the bank in connection

with lactose, which is the subject of this action?

A At first, no.

Q My question was did there come any time when you did make such an arrangement?

A Not an agreement, but a discussion.

Q What arrangement was made in connection with the lactose with the bank?

A The first question of the BFG by Dr. Schuster was whether Meggle would like to purchase these 503.8 tons from the bank.

Q And what was your response?

A Our answer was no. We sell lactose, the implication was our lactose, but we don't buy lactose to sell lactose.

However, we will lend our services in order to act as mediators to sell the lactose for the bank. But the stress was on mediating to sell.

Q And for this Meggle would receive a commission, is that correct?

A Yes, that is correct.

Q Did you thereafter undertake to sell the lactose for the bank?

A Yes.

Q Did there come a time when you had conversations

with someone for Amtraco Corporation?

A Yes, with Amtraco in Rotterdam, Mr. Stam.

Q What agreement if any did you make with Mr. Stam?

A We have discussed the prices with Amtraco in Rotterdam, as we did in many other companies and places, because we had offered it to many other places, and all of these discussions were always referring back to the Bank Fur Gemeinwirthschaft, to whom we quoted the prices that were offered to us.

Q Did there come a time when the bank and yourself agreed on a price to be made with Amtraco?

A Yes. Mr. Stam informed us that the company would pay 19 cents per kilo and also advised us that we would be informed of this by the home office in New York in writing in what we would call a purchase order.

THE COURT: That is what Mr. Stam told him?

THE INTERPRETER: In a written order, that is the literal translation, and I assume this must refer to a purchase order.

Q I show you Plaintiff's Exhibit 1 for identification and ask you if you can identify that document.

A This let's call the purchase order is dated September 30 -- purchase confirmation. It's even stamped purchase confirmation. I mean, not stamped, it is a form

that is called purchase confirmation by Amtraco. It is dated September 30 and has the receipt stamp of October 11 by the firm Meggle and it is countersigned or, rather, initialled by the witness, by me.

MR. HORAN: Your Honor, I offer that in evidence, Plaintiff's Exhibit 1.

MR. ROSENSTOCK: There is some writing on the bottom which I am not fully able to read. If that could be clarified first.

MR. HORAN: He is entitled to voir dire, your Honor.

MR. ROSENSTOCK: You can do it.

THE COURT: Are you offering the writing also?

MR. HORAN: I am offering the document not for its apparently superimposed pen writing. I will explain it, your Honor.

Q Showing you again Plaintiff's Exhibit 1, Mr. Baumann, whose handwriting, if you know, is on that document, other than the signature?

A The writing says "To Dr." --

Q Whose handwriting is it?

A It is my handwriting and it says "Copy to Dr. Freese, Bank Fur Gemeinwirthschaft," and on the same date -- on April 10, 1972.

Q This is a note to yourself for your reference?

A Yes.

MR. ROSENSTOCK: I have no objection with a stipulation that that writing was not on it at that time.

MR. HORAN: Yes, of course.

THE COURT: All right. Received.

xx (Plaintiff's Exhibit 1 received in evidence)

MR. HORAN: Your Honor, may I give you a copy and show the original to the witness?

THE COURT: Yes. This is a copy of the same document?

MR. HORAN: Yes, the same document.

Q Mr. Baumann, looking at the document which has been received as Plaintiff's Exhibit 1,does this document contain the terms discussed by you with Mr. Stam?

A It reflects not only the agreement that I made with Mr. Stam, but it also reflects what I agreed upon after speaking to the bank about the agreement.

Q But before receiving this document?

A Before receiving this document,yes.

Q Can you explain to the Court your understanding of the terms which are stated to be "payment will be made by us to American Bank and Trust Company after goods have passed inspection of the Canadian Government

authorities upon delivery"?

MR. ROSENSTOCK: Your Honor, I object to that question. I think that the writing itself is complete. I don't think that his conclusions or opinions are proper testimony.

MR. HORAN: Your Honor, I am asking him merely to explain, amplify a document which is not altogether clear on its face.

THE COURT: Aren't you conceding that parol evidence is admissible then?

MR. HORAN: No, I am not. I think it is different to allow some discussion of what a document means consistent with the interpretation that we are arguing that it has, as long as his testimony doesn't contradict the document and talk about a brand new deal.

I am just asking him to explain rather cryptic terms and his understanding of some of those terms.

THE COURT: I will allow the testimony.

A In many countries it is usual that products, and especially products of the food sector, have to be inspected by a veterinary or by some governmental agency to determine whether such a product may be imported at all.

For us there was no problem to accept this

paragraph in the terms because with this product we have produced a food material which we export worldwide and for which we have to have no worry at all.

Q Mr. Baumann, directing your attention to the price, in your opinion, was that a good price for the lactose market at that time?

MR. ROSENSTOCK: Your Honor, I object unless there is some type of foundation laid that he has the knowledge of what the market would be in New York and the factors that go into determining whether it is a good price.

I don't think there is any foundation laid for that at all.

MR. HORAN: Your Honor, it is his business.

THE COURT: What is the relevance whether it is a good price or a bad price?

MR. HORAN: There isn't any immediate relevance, your Honor, except that there is a contention here that later on, when these goods were sold, they were sold in a commercially unreasonable manner.

THE COURT: I will permit you to cross-examine or have voir dire on his expertise. It seems to me prima facie his occupational duties qualify him.

MR. ROSENSTOCK: My only objection was he lives

and resides in Germany, he has no knowledge of the American market.

THE COURT: He says he does this worldwide. If you want to cross-examine him on that issue --

MR. ROSENSTOCK: Thank you, your Honor.

THE COURT: You can do it now if you want.

MR. ROSENSTOCK: I will wait.

MR. HORAN: What was the answer? May I have the answer to the question?

A For that one should state first in general that milk products and agrarian products in general are subject to variations in price.

Q Direct your attention to 1971, Mr. Baumann, and to the time of this purchase confirmation.

A At that point in time-- as far as I remember, at that point in time there was an overproduction in this field in the United States. The price we had negotiated and that is reflected in this purchase confirmation reflected the condition of the market at that time.

Q Mr. Baumann, do you know whose signature is at the bottom of Exhibit 1?

A I am not sure at all, but since at the later point I had to deal with Mr. Neumann, I would imagine

or could imagine that that might be Mr. Neumann's signature.

Q You don't know for sure whether it is Mr. Neumann's signature?

A No. I only have his calling card, but I don't have his autograph.

Q Did there come a time shortly after September 30, 1971 when you met a man named Mr. Neumann?

A Yes.

Q Where did you meet him?

A In New York.

Q When?

A Upon the request of the bank I flew to New York on October 19, 1971 and was picked up at the airport by Mr. Neumann, who had invited me to his office on October 20.

Q Did you have a discussion with Mr. Neumann on that date, on the 20th of October?

A Yes.

Q About the lactose at issue here?

A Yes.

Q What did Mr. Neumann say to you on that day?

A I have a confirmation about this conversation.

Q I asked you, Mr. Baumann, if you would state

for the Court what he said from your recollection.

A Mr. Neumann said to me that as far as he was concerned, this business had been concluded.

Q By "this business" you were referring to the lactose deal in the purchase confirmation, is that correct?

A Yes, I mean the purchase of the lactose which is confirmed in that purchase order.

Q Going back to when you received the purchase order, did you do anything further with respect to the purchase confirmation?

A Yes, I have. I have contacted the bank, and I should add that during that time at the bank a Dr. Freese was handling the matters of this purchase, and I informed Dr. Freese to prepare the documents which then had to be forwarded to the bank, which I believe was the American Bank and Trust Company, which was handling the purchase for Amtraco in New York.

During my visit to Mr. Neumann it was determined that this documentation of the bank's was in the office of Amtraco.

Q Mr. Baumann, after your discussion with Mr. Neumann on the 20th did you return to Germany?

A Over Canada to Germany.

Q Did you report to the Bank Fur Gemeinwirthschaft when you returned?

A I confirmed the visit to Mr. Neumann's office in a letter and I sent a copy of it to the bank.

Q Did you have, subsequent to October 20, further conversations with Mr. Neumann?

A Only by Telex and once in a telephone call.

THE COURT: Mr. Baumann, do I understand that in your conversation of October 20 Mr. Neumann confirmed to you that these documents listed on the purchase order had been received by American Bank and Trust Company?

THE WITNESS: Yes.

Q Mr. Baumann, did there come a time when you learned that the lactose was-- this is after October 20, 1971 -- was still in the warehouse and that Amtraco had not moved the inventory and had not paid under the contract, under the purchase confirmation?

A Yes, I was informed of this by Dr. Freese of the bank.

Q Did you thereafter have a conversation with Mr. Neumann about the subject?

A Yes. We have requested Mr. Neumann several times to take a position by Telex.

Q Did Mr. Neumann state his position by Telex to you?

A There were several and every time evasive Telexes which stated that he was still in the examining stage.

MR. ROSENSTOCK: Your Honor, I would object to that last statement, move to strike it. I think it is a conclusion, the word "evasive" particularly.

If he wants to refer to the Telexes they can be introduced.

THE COURT: That seems to me correct.

MR. HORAN: I can't control the answer, your Honor. I agree that that should be struck.

THE COURT: Yes. Strike it.

Q Mr. Baumann, to your knowledge, was the lactose ever moved by Amtraco from the New Jersey warehouse?

A When I was informed by Dr. Freese that Amtraco had not undertaken the shipping of the lactose we were asked for assistance, suggestions.

Q Did you offer advice, suggestions, to the bank at that point?

A We have contacted a business friend, Mr. Silverman of PTX Food in White Plains to get in touch with the bank's attorneys.

Q Was Mr. Silverman known to you to be a dealer in lactose?

A Not as a dealer in lactose, but as a good businessman involved in the milk industry with good contacts all over the United States.

Q Can you tell us about when you suggested Mr. Silverman to the bank, to your best recollection?

A It must have been in the middle of 1972.

Q Thereafter, after the middle of 1972, did you continue to advise the bank on how to dispose of the lactose?

A No. However, I was informed that Mr. Silverman disposed of the lactose in smaller quantities on behalf of the bank.

Q Was it your advice to the bank that the goods should be sold in smaller quantities?

A No. This was an action taken by Mr. Silverman, who was acting on behalf of the bank, and he assumed that by disposing of the merchandise in small quantities he could achieve the best price.

MR. ROSENSTOCK: Your Honor, I object to the last part of the statement. He is talking about an assumption of Mr. Silverman.

THE COURT: The answer wasn't responsive.

MR. HORAN: The answer wasn't responsive. Can we see what I asked?

THE COURT: You just asked whether he advised it.

MR. HORAN: Yes.

I will put another question.

Q Did you at any time advise the bank that disposition of this lot was preferable in small quantities?

A That is quite possible. However, I just do not remember. However, at the time --

Q Let me interrupt. You don't remember giving any advice to the bank about this subject at all?

A No, I cannot say so 100%.

Q In your opinion, at the time in 1972, the middle of 1972, according to your recollection, and thereafter, was it preferable to sell this lactose in small quantities?

MR. ROSENSTOCK: Objection, your Honor. I don't think it is relevant if he didn't tell anybody. It doesn't matter what his opinion is.

THE COURT: I think he is established sufficiently as an expert. You may cross-examine him either now or later on that subject.

A It is my view that at the time it was advisable to dispose of the merchandise in smaller quantities because the market price in general had sunk even further.

MR. HORAN: Your Honor, may I have a minute?

THE COURT: Yes.

(Pause)

MR.HORAN: Could you mark this, please.

xx (Plaintiff's Exhibit 2 marked for identification)

Q Mr. Baumann, I show you Exhibit 2 for identification, Plaintiff's Exhibit 2, and ask you if you can identify that document.

A This is a Telex of February 7.

Q February 7 of what year?

A 1972, which I sent to Mr. Neumann after a discussion with the bank. At the same time I sent the same Telex for information also to Mr. Stam in Rotterdam.

MR. HORAN: Your Honor, I offer this Telex in evidence.

THE COURT: I take it you have a translation of it?

MR. HORAN: It is in English.

THE COURT: Oh, it is in English?

MR. HORAN: It is in English. Don't ask me why, but it is in English.

MR. ROSENSTOCK: No objection, your Honor.

THE COURT: Received.

xx (Plaintiff's Exhibit 2 received in evidence)

Q One further question, Mr. Baumann.

During the year 1972 you testified that the lactose market was down, is that correct?

A Yes.

Q Is that true of the lactose market in the United States, was that true of the market in the United States?

A Also. It was general, worldwide.

Q But true also of the United States?

A Also in the United States, yes.

Q Did that situation obtain in the year 1973?

A If I remember correctly, it lasted through the beginning of 1973.

Q And then prices increased, is that correct?

A Through 1974 they increased considerably.

MR. HORAN: I have no further questions of this witness at this time.

THE COURT: Mr. Rosenstock, do you want a few minutes to organize your thoughts?

MR. ROSENSTOCK: Yes, your Honor.

THE COURT: We will take a short recess.

(Recess)

CROSS-EXAMINATION

BY MR. ROSENSTOCK:

Q Mr. Baumann, Meggle's primary business is selling commodities, is that correct?

A Yes.

Q Do they manufacture commodities as well? Is that also true?

A Yes.

Q Does that include edible lactose such as involved in this case?

A Yes.

Q Normally Meggle does not act as an agent on anyone's behalf, is that true?

A No, generally not.

Q Excuse me. Does not act as an agent?

A No, they don't act as agent.

THE COURT: Off the record.

(Discussion off the record)

Q You testified that you had agreed to an arrangement with the bank to help them dispose of the lactose?

A Yes.

Q Yet Meggle signed the purchase order, that is correct, is it not?

MR. HORAN: Objection. Meggle has not signed

any purchase order.

THE COURT: He can answer no then.

MR. HORAN: I didn't want anything to be lost in the translation. It is very clear from the document itself.

THE COURT: It seems so to me.

MR. ROSENSTOCK: Excuse me, your Honor.

My error. I am sorry.

Q Did you receive a copy of the purchase order which is Plaintiff's Exhibit 1?

A Yes, we received the original, not a copy.

Q Did you note that the purchase order was made out to Meggle and not to the bank? Did you observe that?

A Yes.

Q Did you ever advise Amtraco that that was an error?

A Yes.

Q Did you do that in writing?

A Yes.

Q What writing was that?

A I have done it verbally and in a Telex, which the Court has here.

Q You are referring to Plaintiff's Exhibit 2?

A I am looking for the German translation.

It is paragraph 3, where it states-- paragraph 3 shows that we are appearing as agents.

Q Was that the first time that you advised Amtraco in writing that you were agents for the German bank?

A No. If you cared to read the Telex you would note that I said so already during my visit on the 20th of October in New York.

Q But my question to you, Mr. Baumann, was whether that was the first time you advised Amtraco in writing about this?

A Yes.

Q Could you just explain to me exactly what is edible lactose?

A Lactose is the carbohydrate of milk.

Q Is edible lactose different from other types of lactose?

A Yes.

Q In what ways? Could you describe it?

A There is a technical lactose which is not as pure, there is an edible lactose which has the highest purity, and then there is a pharmeceutical lactose which has the highest purity.

Q I think you just said there were two that had the highest purity, the pharmeceutical and the edible

lactose.

Is there a difference between those two?

A There are various criteria, but the edible one is the one that we are dealing with.

THE COURT: He wants to know which is the higher purity, pharmeceutical or--

THE WITNESS: Pharmeceutical is the purest.

Q Which type is the lactose here?

A The one that we are discussing is the edible lactose.

Q Does Meggle make all various types of lactose or do they specialize in edible lactose?

A All three.

Q What is edible lactose used for?

A Among other things, it is used for baby food. In a very broad way, it is used in the food industry in general.

Q Does it have a wide use?

A Yes.

Q It is something that is commonly sold, is it not?

A Oh, yes.

Q In fact, edible lactose is sold almost on a daily basis, that is correct as well, isn't it?

A Yes.

Q It is sold worldwide?

A Yes.

Q Is the United States a large market for edible lactose?

A Yes.

Q Is the New York area one of the prime market-places for the sale of lactose, edible lactose?

A Not necessarily. It is everywhere where foods are processed.

Q When the bank first contacted you they informed you that the lactose was already in storage in the United States, is that correct?

A Yes.

Q Did they advise you how it came about that the lactose was in storage in the United States?

MR. HORAN: I object on the ground of relevancy, your Honor.

MR. ROSENSTOCK: Your Honor, I think it is relevant for two purposes. One, I think it is important to show the background leading up to this transaction, and second, I think the history of the lactose and how long it was around will have some bearing on its market value and when it could be sold and the circumstances

relating to that issue as well.

THE COURT: I will allow it. He may answer.

A We do not know how this came about. We received certain information about this. However, I never consulted those files, documents.

Q Do you recall what any of this information was?

MR. HORAN: Your Honor, I object to the vaguness of that. I don't think it permits one to go any further with that. It is rather like a deposition.

THE COURT: Overruled.

A We knew that we had sold this merchandise to a firm called Bauer and that we had our money.

Q Had whose money?

A That we had the money and that it had been accredited to us.

Q To Meggle?

A Yes.

Q You mean the lactose had previously been sold to Bauer, is that what you are saying?

MR. HORAN: Objection. That isn't what he said.

A Yes, by us.

Q By Meggle?

A Yes.

THE COURT: I don't see the relevancy of this.

MR. HORAN: I don't see the relevancy either. I think it is confusing and I don't understand it myself.

Q Does Meggle maintain an agent or broker on its behalf in New York?

A No.

Q Did you contact any brokers in New York in order to arrange for the sale of this lactose?

A Yes.

Q Who was that?

A A whole number of firms who are dealing in lactose and who are also producing lactose and also firms who are using it.

Q Both you mean?

A All three; agents, producers and users.

Q In doing this you contacted Amtraco as well, is that correct?

A Yes.

THE COURT: This is before the purchase of it?

THE WITNESS: Yes.

Q Do you know how long approximately the lactose had been in storage in New York at the time you approached Amtraco?

A Not exactly. Maybe six or seven months.

Q Let me show you these two documents and ask you if you recognize what these documents are.

A Yes. Bauer International was the buyer and in February the merchandise arrived. I never saw these documents, but this is correct.

MR. HORAN: Your Honor, I object. He says he has never seen these before.

MR. ROSENSTOCK: I am just using them to refresh his recollection.

THE COURT: You are trying to refresh the witness' recollection. I assume you can refresh it with a document he has received.

You might mark it for identification.

MR. ROSENSTOCK: Yes.

xx (Defendant's Exhibits A and B marked for identification)

Q Did you also forward Amtraco a chemical analysis of the lactose involved in the purchase?

A Yes, we have a standard analysis which we sent.

Q I will ask you if this is the standard analysis that you forwarded?

A Yes, it is. This is part of the documentation

which was furnished to Bauer at the time of the sale to them.

Q This in turn was forwarded to Amtraco as well, is that correct?

A From the bank to Amtraco.

MR. ROSENSTOCK: I offer this into evidence.

MR. HORAN: It is not clear to me from these documents, your Honor, that the same goods are described on this.

THE COURT: Why don't you take him on the voir dire? He says they are the same.

MR. HORAN: He has said that?

Let me ask him a question on voir dire, if I may.

VOIR DIRE EXAMINATION

BY MR. HORAN:

Q Mr. Baumann, is the lactose described on the face of Defendant's A for identification the same quantity as was later sold to Amtraco?

A The addition of these sums should reflect the 500 and so metric tons.

Q It is just using a different measurement of weight, is that correct? If you add the kilograms on the two certific tes of origin, do you come out with the

same metric tons?

A This is gross and the net has not been deducted, the tare has not been deducted.

Q Mr. Baumann, do you know of your own knowledge that the goods described in these two certificates of origin are the same goods that are at issue in this lawsuit between Amtraco and B. F. G.?

A According to the information of the bank, the answer is yes.

MR. HORAN: I don't see the relevancy of it, but I won't pursue it.

THE COURT: Have you got your exhibits premarked?

MR. ROSENSTOCK: Yes,your Honor.

THE COURT: What were the other two exhibits?

MR. ROSENSTOCK: The other ones I think were initially G and H.

THE COURT: All right. We will withdraw A for identification and B for identification and re-mark them G and H for identification.

xx (Defendant's Exhibits G and H marked for identification)

THE COURT: What are you now offering?

MR. ROSENSTOCK: Exhibit F.

MR. HORAN: I object on the grounds of relevancy, but no other objection.

THE COURT: I will allow it.

xx (Defendant's Exhibit F received in evidence)

THE COURT: Do I understand, Mr. Baumann, that this Exhibit F is the chemical analysis certificate referred to in this document, which is Plaintiff's Exhibit 1?

THE WITNESS: Yes, it is.

BY MR. ROSENSTOCK:

Q In your discussions with Amtraco leading up to this purchase order you were advised, were you not, that Amtraco was going to sell the lactose to a Canadian customer?

A We noticed this in the confirmation of the purchase.

Q So you also knew that they were not buying it for their own account, for themselves?

A Yes.

Q You also knew that Amtraco was only to make payment upon delivery, is that correct?

A No, we didn't know. No, only after the inspection by the Canadian authorities.

Q Doesn't that have to be upon delivery?

A Yes, naturally.

Q Of course. They would not inspect them in the New Jersey warehouse, that is correct, isn't it?

A Not the Canadian authorities.

Q In fact, isn't it also true that you knew Amtraco had a particular transaction in mind at the time they made this agreement with you?

A No.

Q You knew they would be shipped to a Canadian customer though, correct?

MR. HORAN: Objection. He said he didn't know that. He has just asked the question in a different form.

THE COURT: It seemed to me it was confusing.

What did you know about what Amtraco was going to do with these goods?

THE WITNESS: I had to know that the merchandise was going to Canada simply because on the purchase confirmation it stated that it was going to be subject to the inspection and acceptance by the Canadian authorities.

VOICE: Incorrect translation.

MR. ROSENSTOCK: Excuse me, your Honor.

VOICE: There was an incorrect translation. He did not say "I had to know," but "I had to assume."

There is a big difference --

MR. HORAN: Your Honor, can we identify that man,

ask him to leave?

THE COURT: Who are you, sir?

VOICE: I am a friend of Mr. Baumann.

THE COURT: A friend of Mr. Baumann?

THE INTERPRETER: I apologize. It is correct. Mr. Baumann said "I had to assume." Quite correct. In this case --

THE COURT: The difference is immaterial.

Q You also testified that you had a meeting in New York with Amtraco with respect to this matter, is that correct?

A Yes.

Q And you prepared a letter summarizing your discussions at this meeting, is that correct?

A Yes.

Q Do you have that letter with you?

A Maybe.

Q If not, let me show you this. Is this a copy of the letter that you forwarded to Amtraco?

A Yes.

MR. ROSENSTOCK: I would like to offer this into evidence.

Q Is this the original letter that you forwarded Amtraco?

A That is a copy, my copy.

Q Only a copy?

A Only a copy. I sent the original to Amtraco. I cannot have the original.

THE COURT: If we are all agreed it is a copy, it doesn't make much difference.

MR. HORAN: I have no objection.

MR. ROSENSTOCK: I offer this into evidence. This would be Defendant's Exhibit S.

xx (Defendant's Exhibit S received in evidence)

BY MR. ROSENSTOCK:

Q Mr. Baumann, you testified before that at this meeting Mr. Neumann told you that as far as he was concerned the business transaction was concluded, is that correct?

A Yes.

Q However, in this letter you stated, as the letter reads to Mr. Neumann, that he considered the transaction to be more or less settled?

A Yes.

Q It wasn't absolutely confirmed at that time, was it?

A Mr. Neumann is German and in the colloquial way in which we deal I would have assumed that Mr. Neumann meant

that it was actually concluded.

Q But that was just your conclusion though?

A Yes.

Q But he told you more or less settled though, that is what he told you actually, wasn't it?

A He did not know the specific shipment date and that is why more or less.

Q In that letter on the second page do you also mention that you discussed additional sales to be transacted with Amtraco?

A Yes.

MR. HORAN: I am going to object to this on relevancy, your Honor.

MR. ROSENSTOCK: I think this will show the nature of the dealings of the parties.

THE COURT: I think I will allow it.

Q These additional sales, again, Amtraco was to resell these goods on your behalf?

MR. HORAN: Objection to that, your Honor. That assumes a legal conclusion.

THE COURT: It is cross-examination. He can lead.

MR. HORAN: It is likely to be misunderstood in the translation, your Honor.

MR. ROSENSTOCK: Your Honor, if he keeps coaching the witness he won't be able to get what the witness wants to say.

A We made business everywhere, including with agents.

Q I notice on page 2 that you quote a price,a proposed price of $300 per ton. Do you see that?

A Yes.

Q Is that a metric ton?

A Metric ton.

Q How does that price compare with the price of the purchase order of the goods sold to Amtraco?

A At that time I didn't have the actual market price in my head.

Q Looking at Plaintiff's Exhibit 1, the purchase order, the price there is 19 cents per kilo.

Do you know what that would be in terms of per ton?

A 190.

THE COURT: $190 a metric ton?

THE WITNESS: Is that correct?

Yes, that is correct.

Q This figure of $300 per ton you quote, does that represent what you believe to be the market value at that

time?

MR. HORAN: I object, your Honor. We don't really know what this refers to and whether these are the same kind of goods.

THE COURT: You asked him whether it was a proper price so I usppose this is proper cross-examination.

A One cannot say whether this was $10 or $20 more than the market value. One always tries to work on the best price possible.

Q By the way, did you ever attempt to sell the lactose, the bank's lactose, to this customer Wyeth which you refer to on the second page of the letter?

A Yes, also, but always only as agent of the bank. Wyeth is one of our clients.

Q Let me just show you this document and ask you if you can identify it.

A This Telex must be our Telex because Mr. Jung is the head of our sales department.

Q This was forwarded to whom?

A It was sent to Dr. Schuster of the Bank Fur Gemeinwirthschaft.

MR. ROSENSTOCK: I offer this into evidence.

THE COURT: What exhibit?

MR. ROSENSTOCK: Defendant's Exhibit T.

MR. HORAN: I have no objection.

THE COURT: Received.

xx (Defendant's Exhibit T received in evidence)

Q You testified before that subsequently you were informed that the transaction Amtraco had with the Canadian customer fell through essentially, is that correct?

A No, I did not say that.

Q Did you eventually learn that the goods were not shipped to Canada?

A The bank informed us that the merchandise was still in the warehouse in New Jersey. Therefore, one cold assume that the sale to Canada had not been perfected.

THE COURT: What bank was that?

THE WITNESS: The Bank Fur Gemeinwirthschaft.

Q Didn't you have some discussion with Amtraco in which they advised you that Amtraco's customer in Canada was trying to cancel the purchase?

A No. No, I cannot recall, no word from Amtraco.

Q I would just like to read you the third paragraph of Exhibit 2,which is a letter from you to Neumann.

You state, "When phoning with the undersigned in Rotterdam on October 17, 1972 you told that your customer in Canada is trying to cancel the order."

A Oh, yes.

Q You recall that now?

A Oh, yes. I had a phone call with Mr. Neumann in Rotterdam. You remember me, yes. I have been there to ask what he did with the order.

Q Was that the first time that you learned of this difficulty or --

A Now maybe I think so.

Q You didn't know about it directly or indirectly before then?

A Please repeat the question.

MR. ROSENSTOCK: Could you read back the question, please.

(Question read)

A As I said before, I really cannot remember well.

Q When Mr. Neumann informed you of this did you inform the bank, the German bank?

A Yes.

Q Did you write them or did you just call them?

A The bank has received a copy of this Telex.

Q That was the first time that you advised the bank?

A There have been so many Telexes back and forth that one cannot say.

Q In other words, it is possible that you did not

tell them before this letter then, you don't know?

A Yes. Actually, the Telex would seem to reflect this.

Q In the first paragraph of the letter --

THE COURT: Telex you mean?

MR. ROSENSTOCK: I am sorry. Excuse me.

Q In the first paragraph of the Telex, Plaintiff's Exhibit 2, you make reference to another Telex dated February 3, 1972. Let me just show you this document and ask you if that is the Telex that you were referring to.

A Yes, the answer to the Telex is contained in the Telex which you have.

Q It's also the Telex that you referred to in this letter, Plaintiff's Exhibit 2?

A Yes, Telex in each case.

Q You received a copy of this Telex, is that correct?

A Yes.

MR. ROSENSTOCK: I would like to offer this into evidence.

THE COURT: As Exhibit what?

MR. ROSENSTOCK: Exhibit Y.

MR. HORAN: I have no objection.

THE COURT: Received.

MR. HORAN: I offer only the objection of relevancy.

THE COURT: Received as Defendant's Exhibit Y.

(Defendant's Exhibit Y received in evidence)

Q Mr. Baumann, did you receive a response from Amtraco with respect to that letter, Plaintiff's Exhibit 2?

A You mean that Telex?

Q Yes -- excuse me -- that Telex.

A Yes, I think so.

MR. ROSENSTOCK: That would be Defendant's Exhibit AA for identification.

(Defendant's Exhibit AA marked for identification)

MR. ROSENSTOCK: I offer this into evidence.

MR. HORAN: I have no objection.

THE COURT: That is a different one?

MR. ROSENSTOCK: It's the same thing. I's just that it's the original copy.

THE COURT: Exhibit AA?

MR. ROSENSTOCK: AA.

THE WITNESS: May I have it back?

MR. ROSENSTOCK: Yes.

(Defendant's Exhibit AA received in evidence)

THE COURT: This was Neumann's answer to your

Telex, right?

THE WITNESS: Yes.

Q You testified that there came a time when you attempted to help the bank inselling the lactose to other customers, is that correct?

A Yes.

Q Do you recall when you began to help the bank look for another customer to purchase the lactose?

A Shortly after we were informed by Dr. Schuster concerning this matter.

Q You testified before that it was about the middle of 1972?

A What are you talking about now?

Q You said you began to look for another customer in the middle of 1972?

A Upon the express desire of the bank we were requested to give the nams of possible other clients in order to vacate the warehouse.

THE COURT: The question is when in the year 1972 did this happen, what month?

THE WITNESS: I don't know exactly.

MR. ROSENSTOCK: I have no further questions at this time.

THE COURT: Any redirect?

jh:mg

MR. HORAN: No, your Honor.

(Witness excused)

MR. HORAN: Your Honor, the next witness to be called for the plaintiff is from the American Bank and Trust Company and there are a great deal of documents under subpoena.

We might benefit by five minutes of conference before putting them before the Court.

THE COURT: Why don't we break now for lunch?

MR. HORAN: That is all right with me.

THE COURT: We will resume at 1:30.

MR. ROSENTSTOCK: I think that would be a good idea.

MR. HORAN: That would be fine with me.

(Luncheon recess)

AFTERNOON SESSION

1:30 p.m.

THE COURT: Good afternoon.

MR. HORAN: Your Honor, to begin this afternoon, I want to offer into evidence what has been marked as Plaintiff's Exhibit 3 for identification, which is an original trust receipt admittedly signed by the defendant and to which the defendant has no objection, I understand.

MR. ROSENSTOCK: Yes, that's true.

xx (Plaintiff's Exhibit 3 received in evidence)

F A B I O B O H O R Q U E Z, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q Mr. Bohorquez, are you appearing here under subpoena served on you on Monday of this week?

A Yes.

MR. HORAN: Your Honor, for completeness of the record, I have the original subpoena with affidavit of service to submit.

Q By whom are you employed, Mr. Bohorquez?

A I am employed by American Bank and Trust Company.

Q What is your position?

A I am Assistant Treasurer for this company.

Q How long have you been employed there?

A I have been working with them for fourteen years.

Q I show you Plaintiff's Exhibit 3 in evidence and ask you if you are familiar with that document.

A Yes. This is a security agreement that the bank use when documents are being released to any company.

Q That document has reference to the account of the Bank Fur Gemeinwirtschaft, isn't that correct?

A That's correct.

Q Were you assigned to supervise or administrate that account at the bank?

A Yes.

Q Can you tell us when?

A Well, this particular item was originally handled by somebody else.

Q I understand.

A When this person left the bank I took over this case, which I believe was in 19 -- at the end of 1973. Thereafter I continue handling it.

Q This case, as you call it, concerned the storage and sale and other problems related to a certain amount of lactose, is that correct?

A That's correct.

Q It was your role at the bank to administrate the sale of this lactose for the account of the Bank Fur Gemeinwirthschaft,is that correct?

A That's correct.

Q You were acting as the bank's agent in that capacity?

A Yes.

Q Would you describe in general how you proceeded in acting under that trust receipt with respect to resale of the goods or sale of the goods?

A The procedure was, in accordance with this bank in Germany -- was a company here, I believe the name was P.T.X. Food Corporation. They were taking over this merchandise in accordance with the bank in Germany. Thereafter the bank in Germany --

Q Did you receive instructions to that effect?

A Yes.

Q What were you to do as a matter of banking with respect to this lactose?

A We were following instructions from this bank in Germany any time they want to sell something of the merchandise in the warehouse in our name.

Q The merchandise was held in your name?

A In our name, in accordance with the bank, the

German bank.

Q According to your understanding with the German bank?

A Yes.

Q Then you would release the goods against payment, is that correct?

A That's correct.

Q Then it was your practice to credit the account of the Bank Fur Gemeinwirthschaft, is that correct?

A Whatever proceeds was coming from the sale was being credited to the bank in Germany.

Q And accordingly, if you had a charge to the bank's account --

A We were paying all the charges involved in this, in connection with this matter. We were debiting that account.

Q Did the bank have a special account for this matter?

A They keep only one account with us.

Q So all debits and credits went through this account?

A The same account.

Q Did you yourself havd any dealings with the person who was selling the goods?

A Yes. That's Mr. Silverman.

Q You had conversations with him from time to time?

A Very often.

Q What about with anyone from Amtraco? Did you have conversations with anyone from Amtraco?

A Never.

Q Pursuant to that subpoena which you were served with did you produce here in court a number of documents relating to the bank account you have just described?

A Yes.

Q I show you what has been marked as Plaintiff's Exhibit 4 for identification and ask you if these are photocopies and originals of resale documentation reflecting credits to the BFG account concerning, of course, the lactose at issue in this case?

A Yes, that's correct, originals and copies of the documents.

MR. HORAN: Your Honor, for the convenience of the Court and with the concurrence of counsel for the defendant, I am submitting to the Court photocopies of all the originals with a schedule clipped to the top which does the mathematics and outlines the pertinent data of each. That will be done with each of the groups of documents.

I offer 4 for identification in evidence.

MR. ROSENSTOCK: Is the summary part of the exhibit?

MR. HORAN: Yes. I would offer the summary as part of it because it merely repeats the information on the inside, subject to counsel checking the figures. My mathematics may not be correct.

MR. ROSENSTOCK: I have no objection.

Again, the figures themselves will be subject to verification.

THE COURT: Yes.

xx (Plaintiff's Exhibit 4 received in evidence)

MR. HORAN: I have furnished counsel with a copy of the summary on the top of that exhibit.

MR. ROSENSTOCK: Yes.

Q With respect to the resale of the BFG lactose, were you under any standing instructions in your conversations with Mr. Silverman?

A Yes.

Q What were those instructions?

MR. ROSENSTOCK: Objection, your Honor. A conversation between him and Mr. Silverman --

MR. HORAN: No, no. I want the instructions from the bank to Mr. Bohorquez.

MR. ROSENSTOCK: All right.

A Instructions from Mr. Silverman, you say?

Q No, no. From the Bank Fur Gemeinwirtthschaft.

A Usually we receive instructions from the German bank by Telex and at the same time they were giving instructions from Mr. Silverman.

Q But you yourself did not give instructions to Mr. Silverman? That was my question.

A After we receive instructions from the German Bank.

Q Only after that?

A Right.

Q Was there any standing instruction, is my question, any instruction which didn't vary?

A Was a instruction as the fact that Mr. Silverman was selling this by small lot to different people.

Q That was something that was constant through the period?

A Exactly.

Q I show you what has been marked as Plaintiff's Exhibit 5 and ask you if these documents clipped together are photocopies of the storage charge records of the bank with respect to the lactose in this case, the originals of which you produced here in court today?

A Yes, they are copies of the originals.

MR.HORAN: Your Honor, I offer these under the same format of the schedule annexed, the storage charge records of the bank for the account of the Bank Fur Gemeinwirthschaft, subject again to counsel doing his own addition on the figures.

MR. ROSENSTOCK: Subject to those conditions, no objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 5 received in evidence)

Q I show you what is marked as Plaintiff's Exhibit 6 for identification, which is a collection of photocopies of custom broker invoices and bank records concerning customs duties, ask you if those are duplicates of the bank records with respect to customs duties paid against the account of the Bank Fur Gemeinwirthschaft.

A Yes, they are copies of the original documents.

MR. HORAN: I offer these documents under the same format.

MR. ROSENSTOCK: No objection.

xx (Plaintiff's Exhibit 6 received in evidence)

Q Mr. Bohorquez, I show you Plaintiff's Exhibit 7 for identification and ask you if these are photocopies of original documents in the bank's file for the account

of the Bank Fur Gemeinwirthschaft showing brokerage fees charged to the Bank Fur Gemeinwirthschaft with respect to the lactose in this case.

A Yes, they are copies of the original documents.

MR. ROSENSTOCK: No objection.

xx (Plaintiff's Exhibit 7 received in evidence)

Q Mr. Bohorquez, under the trust receipt the American Bank paid insurance on this lactose, did it not?

A That's correct.

Q And it was invoiced by the insurance company and disbursed money against the Bank Fur Gemeinwirthschaft, is that correct?

A That's correct.

Q I show you Exhibit 8 for identification, Plaintiff's Exhibit 8, and ask you if those are copies of the American bank records reflecting a charge to the account of the bank for insurance for the period on the face of the document.

A Yes, they are copies of the original documents covering insurance.

MR. ROSENSTOCK: No objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 8 received in evidence)

Q I show you Plaintiff's Exhibit 9 for identification

It is an office copy of a debit to the Bank Fur Gemeinwirthschaft in the amount of $1,408. Attached to it is an invoice to the American Bank and Trust Company in the same amount reflecting insurance for a period February 17, 1971 to March 27, 1973 and February 17, 1971 to April 6, 1973 with respect to some other bags, is that correct?

A Yes, that's correct.

Q Is this invoice covering the same goods that are later under the trust receipt?

A Yes, this cover the same lactose.

MR. ROSENSTOCK: No objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 9 received in evidence)

Q I show you Plaintiff's Exhibit 10 for identification, which is an invoice from Freedman & Slater Inc., to winvoices, and ask you if those are from the records you produced here in court today.

Are those photocopies of records you produced here today?

A Yes, they are copies of the original documents.

Q Can you say from those documents whether the amount of the invoice was debited to the bank's account?

A Absolutely.

Q It was?

A The German bank was debited for these charges.

MR. ROSENSTOCK: Your Honor, I have noticed that this invlice has Bauer International written on it and not the German back.

Subject to the witness demonstrating how this invoice relates to the German bank, I would have an objection to it.

MR. HORAN: He has testified that it was charged to the Bank Fur Gemeinwirthschaft and counsel established that Bauer International once had title to those goods.

MR. ROSENSTOCK: I understand that. I don't know if that is these goods. If the witness would explain the basis of the statement maybe I could accept it.

MR.HORAN: There is nothing on the face of that document to indicate the American bank charging the Bank Fur Gemeinwirthschaft. So I asked Mr. Bohorquez?

THE COURT: How can you tell from looking at this document that BFG was--

THE WITNESS: I know because it refers to the same merchandise, lactose. In accordance with our record, the only merchandise we receive lactose was from this bank in Germany.

THE COURT: You didn't have any other lactose?

THE WITNESS: No, sir.

THE COURT: He says the reason he knows it is it's the only lactose he had.

MR. HORAN: I offer this, your Honor.

THE COURT: Received.

xx (Plaintiff's Exhibit 10 received in evidence)

Q Mr. Bohorquez, did your bank on this specific arrangement under the trust receipt charge a service charge to the bank in Germany for your services in this respect?

A That's correct, bank services, bank charges.

Q For entering into the trust receipt arrangement and administrating it?

A That's right.

Q I show you what has been marked as Plaintiff's Exhibit 11 for identification.

Is that a photocopy of an American bank record showing the service charge you described for the period on the face?

A Yes, this is copy of an original debit for our charges.

MR. ROSENSTOCK: My only objection here would be one of relevancy, because I think that entering into the trust receipt relationship was part of the original understanding and certainly there wasn't anything there

to indicate that Amtraco was liable or would have to pay this amount. So I don't know that it's relevant. If you want to take it --

THE COURT: It establishes that the payments were made but you say it doesn't charge them against your client?

MR. ROSENSTOCK: That's right. I say this amount isn't a proper damage item even assuming everything else occurred.

THE COURT: The objection is noted. It is received without prejudice to your position.

xx (Plaintiff's Exhibit 11 received in evidence)

Q Mr. Bohorquez, the file of documents you produced did not contain any other such service charge invoice, isn't that correct?

A That's correct.

Q Is that because they were lost or couldn't be found or --

A We couldn't find them.

Q I show you what has been marked as Plaintiff's Exhibit 12 for identification, ask you what that is.

A This is a letter addressed to the bank in Gemany.

Q It is a letter by you, isn't that correct?

A Signed by myself and enclosing debits for $309.18 representing some storage charges. Also was a debit for $1,239.82 representing our handling charges for the years of 1972 and 1973.

Q The service charge is the same per annum, is that correct?

A That's correct.

MR. ROSENSTOCK: I object, the same objection as I made to the previous item.

THE COURT: Received without prejudice to your position.

xx (Plaintiff's Exhibit 12 received in evidence)

Q Mr. Bohorquez, did the American Bank and Trust Company records reveal that the American Bank ever received any moneys from Amtraco Corporation under the trust receipt?

A As far as I know, I don't think so.

Q Have you searched the records?

A Yes.

Q And there were never any payments for storage charges or insurance charges?

A No.

MR. HORAN: I have no further questions of this witness, your Honor.

CROSS-EXAMINATION

BY MR. ROSENSTOCK:

Q The American Bank and Trust Company was the agent of the bank throughout the time that you administered this security agreement?

A Yes.

Q And they were agent for the bank the entire time the agreement was in effect, is that right?

A Yes.

THE COURT: By "agreement" you are referring to this trust agreement?

MR. ROSENSTOCK: Right, Plaintiff's 3.

Q Other than the administrative functions that you described did the American Bank and Trust Company perform any other services for the bank?

A I didn't get you. I am sorry.

Q Other than the administrative services that you just described did American Bank and Trust Company perform any other services for the bank, the German bank?

A No, I don't think so.

Q They never, as far as you know, were involved in attempting themselves to sell or dispose of the goods, is that correct?

A I have no idea.

THE COURT: As far as you know, they weren't?

THE WITNESS: As far as I know. I don't know.

Q You have no familiarity with what steps were taken to actually resell the goods, do you?

A I have no idea.

Q You testified that the American Bank and Trust Company would debit the German bank for the storage charges that were incurred?

A That's correct.

Q How often was this done? Was it done on a weekly or monthly basis? What type of basis was it done on?

A I believe it was done on a monthly basis. Every time we received the invoices from the warehouse.

Q You received these invoices every month?

A I believe was a monthly basis.

Q Then you would in turn forward the invoices on to the German bank?

A That's correct.

Q You testified before that you never received any type of money from Amtraco, as far as you know?

A As far as I know, no.

Q Were any bills ever sent to Amtraco?

A I never saw any.

Q You never saw any bills at all ever sent to

Amtraco?

A No.

Q So from the effective date of this security trust agreement the goods were always under the bank's control, is that correct?

A Excuse me?

Q From the effective date of that security trust agreement, Exhibit 3 Plaintiff's Exhibit 3, the goods were always under your control, is that correct?

MR. HORAN: I object to the form of that question.

THE COURT: What do you mean?

Q You had the responsibility for administering and taking care of the goods, is that correct?

A As I say before, was some other gentleman handled this originally and I took over in 1973, I believe.

Q But the American Bank and Trust Company administered the goods throughout this entire period?

A Yes, prior to this time I believe American Bank was taking care.

Q Do you have any knowledge of any of the goods in storage being defective or having been damaged in any way?

A I have no idea.

Q Did you at any time release goods for purposes of sampling, release any of the goods to be sampled?

A No, never.

Q Let me just show you this document and ask you if you can identify what the document is.

A Yes. This is a letter from American Bank and Trust Company addressed to the warehouse.

As I say before, somebody else was handle this. I never knew about this.

Q Do you know this person, L. Buranyi?

A He was originally the gentleman this particular case or this particular document.

Q He was your predecessor, you mean?

A Rith, that's correct.

MR. ROSENSTOCK: I would like to mark this Defendant's FFF for identification.

xx (Defendant's Exhibit FFF marked for identification)

MR.ROSENSTOCK: I offer this into evidence.

THE COURT: Any objection?

MR. HORAN: No objection.

THE COURT: Received.

xx (Defendant's Exhibit FFF received in evidence)

MR. ROSENSTOCK: Your Honor, this is going to take

a moment because there were some additional letters and documents. I don't want to burden the record.

THE COURT: You want to take a short recess?

MR. ROSENSTOCK: If we could take about five minutes I would appreciate it.

THE COURT: Sure.

(Recess)

BY MR. ROSENSTOCK:

Q During your administration of these documents on behalf of the American Bank and Trust Company, did you ever complain to the German bank that progress was not going fast enough in disposing of the goods?

A I don't think so.

Q Let me show you this letter dated July 15, 1974 and ask you to identify it.

A Yes, that is a letter by the American Bank and Trust Company to the German bank.

MR. ROSENSTOCK: This doesn't have any marking because it was one of the subpoenaed documents.

xx (Defendant's Exhibit A marked for identification)

MR. ROSENSTOCK: I offer this into evidence.

MR. HORAN: No objection.

THE COURT: I suppose you can stipulate that the

witness supply a photostat instead of the original?

MR. ROSENSTOCK: I don't think the photostats include photostats of these letters, so we will have to make one.

xx (Defendant's Exhibit A received in evidence)

Q Do you recall receiving a response to that letter?

A I don't recall.

Q Let me show you this letter and ask you if this is the response that you received.

A Apparently this is the reply.

MR. ROSENSTOCK: Can I have this marked as B.

xx (Defendant's Exhibit B marked for identification)

Q This Defendant's Exhibit B for identification which you just identified refers to an enclosure. Is the enclosure following it the one that you received?

A Yes, that's correct.

MR. ROSENSTOCK: Maybe we should just make it part of the same exhibit.

THE COURT: B will be considered the letter and the enclosure.

MR. ROSENSTOCK: I offer that in evidence.

MR. HORAN: I have no objection.

xx (Defendant's Exhibit B received in evidence)

THE COURT: Who is Mr. Steckel?

MR. HORAN: Mr. Steckel is one of my partners.

Q I noticed when you were testifying on direct I thought you were referring to some notes.

Were you looking at some notes to help referesh your memory when you testified?

A What kind of notes?

Q Just a few moments ago when you were testifying on direct examination I thought you were looking at some notes to help refresh your memory and I was wondering if you were looking at any.

Were you looking at any notes?

A A few minutes ago you say?

Q Yes, when Mr. Horan was asking you questions when you were on the stand. Were you looking at some notes at that time?

A No.

THE COURT: I didn't notice any. He looked at his file from time to time.

A I have in my hands only the security agreement.

MR. ROSENSTOCK: No further questions, your Honor.

THE COURT: Any redirect?

MR. HORAN: No, your Honor, no redirect.

THE COURT: Thank you.

(Witness excused)

MR.HORAN: Your Honor, plaintiff had next intended to call Mr. Werner Neumann, who apparently is not in the courtroom or the country. Instead I call Mr. Silver, who I believe is here.

J O S E P H S. S I L V E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q Mr. Silver, what is your position at Amtraco?

A I am the sales manager.

Q How long have you worked there?

A A little over four years.

Q You were at Amtraco during the year 1971?

A I joined them during the year 1971.

Q You are familiar with the transaction at issue in this case concerning the lactose, is that correct?

A By familiar, what do you mean by familiar? I wasb't involved with the transaction itself, no.

Q Did you work in Mr. Neumann's office at that time when you first joined the company?

A I worked in the comipany, not in his office.

THE COURT: I am confused. Who is the man the first witness--

MR. HORAN: That was Mr. Silverman. This is Mr. Silver of the defendant.

THE COURT: I see.

Q What part of the company?

A Well, I worked in-- when you say the office, I thought you were talking about a geographical area.

I worked in the company, I was in his division.

Q In commodity trading, is that correct?

A Yes.

Q I show you what has been marked Plaintiff's Exhibit 13 for identification.

Can you identify that document?

A Yes. It is a photostatic copy of a sales contract.

Q That is an Amtraco document, is it not?

A Yes.

Q Issued and dated, as it says, September 30, 1961 to a Canadian company, is that correct?

A That's right.

Q The subject of that sales contract is the same lactose as is the subject of this suit, is it not?

A It appears to be.

MR. HORAN: Your Honor, I offer this photocopy of a sales contract in evidence.

Your Honor, counsel has the original of this document and doesn't object to the use of a photocopy.

MR. ROSENSTOCK: Actually I think we should use the original because there is writing on the back.

MR. HORAN: All right. That's fine with me.

THE COURT: Substitute the original.

MR. ROSENSTOCK: No objection.

(Plaintiff's Exhibit 13 received in evidence)

Q By this sales contract, Mr. Silver, isn't it the fact that Amtraco was selling- - which I show you so that you can see what I am referring to --was selling these goods in its own name?

MR. ROSENSTOCK: Objection. I think the contract will speak for itself, whatever it says. I don't think that his conclusion would mean anything.

THE COURT: What was the question?

MR. HORAN: The question was, isn't it the fact that these goods were being sold in Amtraco's own name?

THE COURT: The contract does speak for itself.

(Pause)

Q Mr. Silver, looking at Exhibit 13, that contains

an I.D. number, does it not, an Amtraco I. D. number?

A Yes.

Q Is that SUPID and then a number in a box?

A Yes.

Q I show you Plaintiff's Exhibit 1, which has been received in evidence, which is the purchase confirmation, ask you if the I.D. numbers are consecutive on those two documents.

A Yes, they are consecutive in these two documents.

Q Meaning they were executed at about the same time, one just before the other, is that correct?

A I am not sure how-- this is a bookkeeping system and I am not sure how they do it.

MR. ROSENSTOCK: Your Honor, the dates appear on the orders.

THE COURT: They are both dated September 30. Beyond that, do these two consecutive numbers give you any idea of whether they were done the same hour or the same minute or anything of that nature?

THE WITNESS: No.

THE COURT: Presumably one was done first and then the other was second, but one cold be early in the morning, the other could have been late in the afternoon?

THE WITNESS: Yes. It is a bookkeeping system

and I don't know the system at all.

THE COURT: In other words,my guess is as good as yours?

THE WITNESS: That's right.

Q Mr. Silver, isn't it the fact that Amtraco never presented samples of the lactose to the Canadian health authorities?

A I do not know, sir.

Q You have no knowledge of that?

A I was not involved in the transaction.

Q You have no knowledge of this transaction at all?

A I was not involved in the transaction. I have knowledge of it now, yes.

Q What does your knowledge now tell you?

MR. ROSENSTOCK: Objection, your Honor.

THE COURT: Overruled.

Q Did Amtraco ever make any effort to present samples or the goods themselves to Canadian health authorities?

A I do not know, sir.

Q Have you been informed?

A No.

Q No one at Amtraco has told you?

A No.

MR. HORAN: I have no further questions of this witness.

THE COURT: You have no further questions?

MR.HORAN: No.

THE COURT: Any questions?

MR. ROSENSTOCK: Not at this time, your Honor.

THE COURT: You may step down.

(Witness excused)

MR. HORAN: Plaintiff will call Mr. Jove, your Honor.

MR. ROSENSTOCK: Your Honor, can I just approach the bench a second?

THE COURT: On the record or off the record?

MR. ROSENSTOCK: It is an informal thing, more scheduling problems.

(At the side bar)

(Discussion off the record)

(In open court)

R I C A R D O J O V E, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q How long have you worked for Amtraco?

A Since 1965.

Q What is your present position?

A I am executive vice president.

Q In charge of what?

A I supervise all the transactions and operations on commodities and food line.

Q In 1971 what was your position?

A I was executive vice president.

Q You have personal knowledge of the transaction at issue in this case?

A Yes. Mr. Neumann reports to me directly.

Q Did Mr. Neumann report to you then, in 1971?

A Correct.

Q I show you Exhibit 13, Plaintiff's Exhibit 13 in evidence. You recognize that document, do you not?

A Yes, I do.

Q Isn't it the fact that this sale was made before the purchase confirmation which is Plaintiff's 1?

MR. ROSENSTOCK: Objection, your Honor. The document would speak for itself.

MR. HORAN: It doesn't say anything about that.

THE COURT: It doesn't say anything about it.

Q Isn't it the fact, whether the document tells you that or not?

A I don't know.

Q But it isn't uncommon for a commodities broker to sell before they actually have goods, is it; that can be done?

A For a commodity broker I would say that the common thing is to confirm both transactions at the same time. There might be a difference of minutes because you have to talk to --

Q You want to make sure you have in one hand what you are selling in the other, is that the idea?

A Depends the conditions of the transaction.

Q Isn't that in fact what was done here? Mr. Neumann confirmed the purchase of some lactose which was in New Jersey and at the same time sold it in Canada through this sales contract? Isn't that what happened?

A It was a necessary condition of the transaction.

Q Isn't that what happened?

A Yes, it was a necessary condition.

Q And then isn't it the case that the Canadian purchase fell through? Isn't that what happened?

MR. ROSENSTOCK: Your Honor, I am going to object. He has called a witness and I should think he should ask proper questions instead of leading him.

THE COURT: He is not necessarily hostile, but

he is an interested witness on the other side.

MR. HORAN: Even in the new federal rules it says leading questions may be asked. It is spelled out.

THE COURT: Overruled.

Q Isn't that the case, that the sale in Canada fell through to that purchaser named on that document?

A The buyer inform us that they were not going to honor the contract because the individual that transacted this was not authorized to do so.

Q So the net of it was you couldn't sell as you had planned to by that document to the Canadian company named on that document?

A They would not accept delivery.

THE COURT: That is a legal conclusion which is obvious from what the witness has said.

Q Isn't that the reason you then didnot take the goods from New Jersey into Canada?

MR. ROSENSTOCK: Objection, your Honor. I think the contract sets forth what the terms of the agreement were and to ask him whether that is the reason I think is really --

THE COURT: That has nothing to do with the company's reason for doing something. The company might have wanted to act in violation of the contract for all I

know.

MR. ROSENSTOCK: I understand, your Honor. I just thought that is one of the issues in dispute really. That is the point of my objection.

THE COURT: How am I going to resolve it unless I get evidence?

Overruled.

THE WITNESS: Could you repeat the question, please.

(Question read)

A We agreed to take the goods on the condition that they would pass the inspection on delivery.

Q But you never in fact took the goods or any samples to Canadian health inspectors, did you?

A We did not buy, if I may say --

Q Just answer the qusetion.

THE COURT: So far as you know, did you ever take any goods to the Canadian Customs inspectors?

Q Any of these goods, this lactose?

A No, we never made delivery to Canada.

Q But you never took even samples to the Canadian health authorities for inspection, did you?

A No, we did not.

Q You let the goods remain where they were in

New Jersey?

A We did not buy them subject to passage of the sample.

Q I didn't ask you that.

THE COURT: It is obvious they didn't.

MR.HORAN: It is now.

Q Isn't it the fact that from the time that the Canadian purchaser identified on Plaintiff's Exhibit 13 informed you they would not accept the goods, from that time for several months your company and the Bank Fur Gemeinwirthschaft had lots of correspondence and discussion about what to do with these goods? Isn't that correct?

MR. ROSENSTOCK: Objection, your Honor. It is sort of a vague open question.

MR. HORAN: It is leading somewhat.

THE COURT: On the basis of what is already before me I could almost take judicial notice that the answer to that question is yes.

Q Isn't it the case that Mr. Neumann finally made proposals, new proposals to buy the lactose at issue here from the bank?

A Yes, he cooperated to the full extent.

Q He took the position that Amtraco had no

A-90

obligation to move those goods from New Jersey?

A We issued communications to this effect.

Q And it is the case that throughout early 1972 and into June 1972 you were still in communication with the bank in Germany about whether you could resolve this dispute, is that correct?

A Yes. We offered --

Q You couldn't agree on what you wanted to present as new terms and what the bank kept insisting on, isn't that correct?

A We made offers which were rejected.

Q Offers to, in your terms, to buy the goods?

A We could only make offers.

Q At a different price, isn't that correct?

A There might be a slight difference, yes.

Q A difference from the original September 30th purchase confirmation price?

A Correct.

Q In fact, at a lower price?

MR. ROSENSTOCK: Objection.

Q Isn't that correct?

A I don't remember exactly but there are written communications.

Q I show you Plaintiff's Exhibit 14 for identification

Mr. Jove, and ask you if that refreshes your recollection as to whether your company's offer in May 1972 was at a lower purchase price than the purchase price of September 30, 1971?

A This one is. There were other offers also.

Q But this one dated May 24, 1972 is at a lower purchase price, is it not?

A It is.

Q I show you Plaintiff's Exhibit 16 for identification, ask you if that refreshes your recollection about an even later offer in June of 1972 at again a lower price than the Septebmer 30, 1971 price.

Is that correct?

A That's correct.

Q I show you Plaintiff's Exhibit 15 for identification and ask you if you have seen that letter?

A I did.

Q You saw that letter?

A Yes.

Q It is a letter, is it not, from BFG to your company, addressed to Mr. Neumann?

A It is addressed to Amtraco.

Q Dated June 14, 1972.

MR. HORAN: I offer this letter.

MR. ROSENSTOCK: I have no objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 15 received in evidence)

MR. HORAN: Your Honor, I am offering now, without objection, 14 and 16, which are the Telexes which Mr. Jove testified to.

THE COURT: Any objection?

MR. ROSENSTOCK: No objection.

THE COURT: Received.

xx (Plaintiff's Exhibits 14 and 16 received in evidence)

Q I show you Exhibit 16, Mr. Jove. Take a moment to read that, if you would.

Have you read that document?

A Yes.

Q This is an offer dated June 8, 1972, is it not, from Mr. Neumann to Mr. Freese, Dr. Freese?

A Yes.

Q In fact, that is an offer to buy less than the total amount of the lactose, is it not?

A Yes.

Q And it was your company's thought at that time that it would be prudent not to buy all the lactose at that time, isn't that correct?

A-93

MR. ROSENSTOCK: Objection.

THE COURT: That is obvious from the fact that they offered less.

MR. ROSENSTOCK: I think the terms of the letter speak for themselves. I don't think the letter says that. I think it is characterizing the letter.

THE COURT: If I offered to buy ten pounds that means I think it is better to buy ten than to buy fifteen.

MR. ROSENSTOCK: I think the letter doesn't express it that way, your Honor.

MR. HORAN: Here is the letter, your Honor.

MR. ROSENSTOCK: Is that the June 8th letter?

MR. HORAN: That is the June 8th letter.

I am asking about a policy question within the company.

THE COURT: This letter makes it perfectly obvious that this is all they are prepared to do now and hope they will do some more later.

Q After that particular offer you had no further offers to make to the bank, isn't that correct?

A I remember that there was no communication back.

Q After that?

A I understand there was a breakdown on the Telex, we were told.

Q In fact, this litigation had started, had it not, on or about that time?

A We had a communication that they could not answer because the Telex broke down.

MR. HORAN: I have no further questions of this witness.

MR. ROSENSTOCK: Your Honor, I think I will reserve my right to question him as part of our case rather than do it now.

THE COURT: You may s ep down.

THE WITNESS: Thank you, your Honor.

(Witness excused)

MR. HORAN: Your Honor, the plaintiff rests at this point and moves for judgment.

THE COURT: You rest. You don't get judgment until after the defendant --

MR. HORAN: Move to --

THE COURT: You oppose his motion to dismiss?

MR. HORAN: I oppose his motion to dismiss.

THE COURT: All right. I hear his motion. I reserve decision.

MR. ROSENSTOCK: Do you want me not to expand on it now?

THE COURT: You have made a motion to dismiss on

all the grounds available to you and I reserve judgment.

MR. ROSENSTOCK: Thank you, your Honor.

R I C A R D O J O V E, called as a witness by the defendant, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENSTOCK:

Q Mr. Jove, you testified before that you are the executive vice president of Amtraco.

A Yes.

Q How long have you held that position?

A Since 1970 or 1969. I don't remember.

Q How long have you been affiliated with Amtraco?

A Since 1965.

Q Prior to becoming executive vice president what was your position with Amtraco?

A I was vice president and before I was manager of the commodity division.

Q Could you describe the business of Amtraco?

A We are in international trade as importers and exporters of industrial products and also commodities and at the same time we are manufacturers' representative for American companies and also for some overseas companies.

Q When you act on behalf of overseas companies ---

that is in the United States that you act?

A Correct, and in some cases we also represent them overseas.

Q In what capacity do you represent these overseas companies in the United States?

A As agents.

Q To sell their commodities?

A Yes.

Q Can you describe your own functions as executive vice president of Amtraco?

A I supervise the overall operation of anything relating to commodities or food items.

Q Is Mr. Neumann under your supervision?

A Yes. He is the head of the commodity division.

Q He answers to you in terms of hierarchy of the corporation?

A Yes, sir.

Q Are you familiar--

THE COURT: Where is Mr. Neumann now?

THE WITNESS: He is in Iran.

Q This is as good a time as any. What was the reason why Mr. Neumann was unable to be here today?

A Mr. Neumann has been in Iran since the month of April I think and he is involved in some negotiations

to which we have gone to great expense and are about to be concluded and it was impossible to get him out. We were trying to do so. We were advised that the contract might not be pursued because of his absence.

Q The contract was with whom?

A With an agency of the Iranian Government.

Q Are you familiar with a commodity by the name of edible lactose?

A Yes.

Q What is it? Could you describe what it is?

A It is a by-product of milk. It is actually the sugar that is obtained by extraction from whey.

Q What is it used for?

A It is used either in pharmacy or the food industry. It is basically a sweetening agent.

Q Are you familiar with a company by the name of Molkerei J. A. Meggle?

A Yes.

Q That Mr. Baumann testified about this morning?

A Yes.

Q Do you know how Amtraco first came in contact with Meggle?

A Meggle contacted our Rotterdam office.

Q What is the business of Meggle?

A They are in production of dairy products, manufacturing dairy products.

Q What was the purpose for which Meggle approached your office in Rotterdam?

A Meggle told Mr. Stam that they had a lot of lactose in bond in the New York area.

MR. HORAN: Your Honor, I am going to object to any discussions as recounted by this witness of what was said between Mr. Baumann and Mr.Stam preceding this confirmation purchase which is now evidence.

THE COURT: How does Mr. Stam's conversation come in here?

MR. ROSENSTOCK: Actually I was just trying to give the background as to how the matter came up. I am not going to pursue his exact conversations with Mr. Stam.

Q Did you know at that time how long the lactose had been in New York?

A Only from a subsequent examination of the documents when submitted to us. It had been here partly since January and another lot since February.

Q 1971?

A 1971.

Q Is that considered a long time for lactose to be in storage?

MR. HORAN: I object.

THE COURT: He is an expert I assume.

From what point of view is it a long time?

THE WITNESS: It could have been a long time, but we ascertained that it was maintained under proper conditions.

Q Did you enter into an agreement relating to that lactose?

A Yes, we did.

Q That was Plaintiff's Exhibit 1, the purchase order?

A It is a purchase order.

Q Is this a copy of the original agreement that you entered into?

A Yes, this is our purchase order.

Q Were these goods purchased for Amtraco's own account?

A No.

Q For who were they purchased?

A We arranged to act as middleman to make delivery to a Canadian concern.

Q And the name of the Canadian concern?

A Is Montreal Casein and was a subsidiary of a company called Peebles.

Q That is a subsidiary?

A Right.

Q Montreal Casein is a subsidiary of Peebles?

A Yes.

Q Plaintiff's Exhibit 13, that is the sales order that was issued to Montreal, is it not?

A Yes.

Q Did you receive a sales confirmation from them as well?

A No, they returned this, Montreal Casein returned our sales order. We had received a sales confirmation from the broker that handled the transaction for us in Canada.

Q The broker sent you the confirmation and Montreal returned the sales order?

A Correct.

Q This is the confirmation you received from the broker?

A That's the confirmation from the broker.

MR. ROSENSTOCK: This is Exhibit VVV for identification.

THE COURT: Are you offering it in evidence?

MR. ROSENSTOCK: Yes, I am.

THE COURT: Show it to Mr. Horan.

MR. HORAN: I have no objection.

THE COURT: Received.

(Defendant's Exhibit VVV received in evidence)

xx

Q Did Montreal Casein or Peebles receive delivery or accept the goods thereafter?

A They never accepted.

Q Did you receive any communications from them?

A We received communications from the broker, Mr.Fleming, and we also received a letter from Peebles.

Q I show you this document and ask you what that is. This is Exhibit N.

A This is a letter from Peebles Products Limited dated October 26, 1971, addressed to Amtraco Commodity Corporation.

MR. ROSENSTOCK: Offer this into evidence.

MR. HORAN: No objection.

(Defendant's Exhibit N received in evidence)

xx

MR. ROSENSTOCK: The next two documents are Exhibit O and P.

Q I ask you to identify these two documents as well.

A One is a letter from R & R. Fleming Limited dated November 2, 1971, to Amtraco Commodity Corporation, and the second one is a letter from R & R. Fleming Limited

dated November 12, 1971 to Amtraco Commodity Corporation.

MR. ROSENSTOCK: I offer these into evidence.

MR. HORAN: Your Honor, I object to these documents for their contents. It appears to be double hearsay. It appears to relate a conversation with another person about some reasons for not accepting.

MR. ROSENSTOCK: Your Honor, I don't think they are being offered to show whether the man was without authority, but simply to show that Amtraco was informed of what had happened. I think that is why they are being presented.

THE COURT: What difference does it make why they repudiated the contract?

Who is Fleming?

THE WITNESS: He is the broker, the one that sent us the confirmation.

THE COURT: What is the relevance?

MR. ROSENSTOCK: I think it is necessary to show that the transaction with Canada fell through through no fault of Amtraco, but because of what the other people did.

MR. HORAN: But that goes to the contents of those letters.

MR. ROSENSTOCK: I think it just shows that

Amtraco was informed of the fact. It is not so much what the substantive reason was, but the fact is that it was they who did it. I think those letters are necessary to establish it. Otherwise there would be an inference that maybe Amtraco cancelled it and that is just not true.

THE COURT: He has already testified that Amtraco-- that the other side repudiated the contract on the ground that they didn't have authority, that the person who signed the contract didn't have authority to do so.

MR. ROSENSTOCK: Those letters simply are an indication of what transpired.

THE COURT: We don't need anything further. He has testified to that and there is no contradiction.

xx (Defendant's Exhibits O and P marked for identification)

THE COURT: Mr. Horan, you make no contention that they deliberately loused up the Montreal --

MR. HORAN: No, not at all. In fact I think on my examination of Mr. Jove it came out that the deal fell through.

THE COURT: Yes.

Q After you were notified that the Canadian deal fell through did you make any further attempts with the

Canadian purchasers to reestablish that transaction?

A We did, repeatedly, through Mr. Fleming, and directly with the purchaser, and we at one time asked Mr. Fleming to come to New York and we had a discussion on this, but we never succeeded in having them accept the goods.

Q They still refused to accept delivery of the goods?

A Yes, and they never opened a letter of credit.

Q They never opened a letter of credit pursuant to the sales contract?

A Yes, correct.

THE COURT: I assume you sued them in Canada?

THE WITNESS: No, we did not, your Honor.

THE COURT: That is irrelevant, I guess, anyway.

THE WITNESS: They returned the confirmation saying "Received in Montreal," but they did not sign.

Q Did you advise Meggle and the German bank of what had transpired?

A We started by advising Rotterdam,who was in contact with Meggle, through whom we had carried the transaction.

Q After you did that did you attempt to negotiate a further deal, a further transaction with Meggle?

A Yes.

MR. HORAN: Objection.

MR. ROSENSTOCK: The German bank it should be. Excuse me.

MR. HORAN: In reference to what, this particular lactose?

MR. ROSENSTOCK: Yes, right.

THE COURT: We already had that testimony.

MR. ROSENSTOCK: Yes.

Q Showing you Plaintiff's Exhibit 14, can you just describe what that document is.

A This is a Telex originating from Amtraco's office in New York and sent to Dr. Freese at the bank in Germany on May 24, 1972, where we make an offer to purchase the material subject to certain conditions.

Q Did you receive a response to that?

A To the best of my recollection, we were told that they could not accept.

Q Does this refresh your recollection, Exhibit OO?

A Yes, we received a refusal.

THE COURT: Those two are already in evidence?

MR. HORAN: Yes.

MR. ROSENSTOCK: I don't think this one was in evidence. The refusal I don't think was in evidence.

MR. HORAN: You can put that in. No objection.

(Defendant's Exhibit OO received in evidence)

Q Let me show you this document, which is Defendant's Exhibit QQ for identification, and ask you if you can identify that.

A It is a Telex from our office in New York to Dr. Freese in Germany dated June 2, 1972.

Q That was another proposal that you sent after the firest rejection?

A Yes, it was a proposal to increase the price we had originally offered.

MR. ROSENSTOCK: I offer this into evidence.

MR. HORAN: No objection.

(Defendant's Exhibit QQ received in evidence)

Q Referring to Defendant's Exhibit RR for identification, can you identify what that document is.

A It is a Telex from Dr. Freese at the bank in Germany addressed to Mr. Neumann in New York dated June 6, 1972, and again refusing to accept our proposal.

Q That is the June 2nd proposal you mean?

A Yes.

MR. HORAN: No objection.

(Defendant's Exhibit RR received in evidence)

THE COURT: I don't quite see how all this is

relevant.

MR. ROSENSTOCK: First of all, plaintiff has put in some proposals as some sort of indication that transactions were occurring. Additionally, I think that under U. S. S. Section 2-615 when one of the terms of a contract upon which it was based becomes impossible to perform I think one of the aspects of that provision says the parties should at least attempt some type of substitute and I think I am establishing that Amtraco has done this in good faith and this is one of the purposes of this evidence.

THE COURT: Off the record.

(Discussion off the record)

BY MR. ROSENSTOCK:

Q Showing you Plaintiff's Exhibit 16, which was already marked, this is anotherproposal that Amtraco made, is it not, to the German bank?

A This is a Telex from Amtraco in New York to Dr. Freese in Germany dated June 8, 1972, offering to purchase a portion of the lactose.

THE COURT: That is already in.

MR. ROSENSTOCK: That is already in, yes.

Q Showing you Exhibit BBB for identification, I ask you to identify that.

A This is a Telex from Amtraco New York to Dr.Freese dated June 30, 1972, making an offer to purchase the whole lot and pay for the duty for our account.

MR. ROSENSTOCK: Offer that in evidence.

MR. HORAN: I have no objection.

xx (Defendant's Exhibit BBB received in evidence)

Q I think you testified before that you thought the June 8th offer was the last one.

Does this new exhibit refresh your memory now as to that?

A Yes.

Q So this was --

A At the time I had no documents.

Q So actually Amtraco made a further offer on June 30, 1972?

A Correct.

Q Did the German bank ever respond to that proposal?

A It it is the last one then it may be the one thathad no reply because they told us the Telex machine broke down.

THE COURT: I suppose presumably if you prevail on liability your damages would at least be limited to what they would have been if you had accepted the best of these offers?

MR. HORAN: I think that is one of the debates here, Judge. I don't think so. I think under the security agreement, they having repudiated their contract, the bank was free to sell, get the best offer they could to mitigate damages, not necessarily to accept their best offer.

THE COURT: But you could have mitigated at that point. I should think that would be a ceiling on your future damages. It seems to me you had the option to say, "No, I can go for a better offer."

MR. HORAN: In fact they did that and got better mitigation than those offers would have given.

THE COURT: Then it is academic.

MR. ROSENSTOCK: I am not so sure, your Honor.

MR. HORAN: There is another aspect to it. The bank would maintain that it was proper, commercially proper, not to accept these low offers, but to seek other offers, and in so doing, it did use up some time, as these documents show. The sales didn't materialize until a few months later.

I understand what you are saying and --

THE COURT: It just seemed to me offhand --

MR. ROSENSTOCK: I would say if Amtraco has to bear the burden of these storage charges, which were a little over $5,000 a month, which are quite high, I think

that is one of the crucial points.

THE COURT: I am not deciding.

MR. HORAN: I understand.

Q You mentioned some Telex daying the machine had broken down. Is this the Telex you are referring to, Exhibit DDD?

A Yes.

THE COURT: Why did they send you a Telex saying the Telex had broken down?

THE WITNESS: It is a Telex from Dr. Freese addressed to Mr. Neumann in New York and it is dated July 6, 1972, where they tell us-- they tank us for the Telex dated July 5 and they say that unfortunately no Telex communication was possible with Mr. Steckel until now and I hope the machine is in order again, and I will Telex you our decision immediately afterwards.

MR. ROSENSTOCK: I offer this in evidence.

MR. HORAN: No objection.

xx (Defendant's Exhibit DDD received in evidence)

MR. HORAN: I just want to make certain the date is what you are saying it is.

THE COURT: It says here, "Accepted July 8,1972." That is written out.

Q You never received a response?

A I don't recall. I don't think so.

Q In fact the lawsuit was initiated thereafter?

A That's right.

Q One last question, Mr. Jove.

Prior to signing the purchase order, Plaintiff's Exhibit 1, on September 30, 1971, did Meggle ever inform Amtraco that it was acting on behalf of the German bank?

A No.

THE COURT: Is that relevant?

MR. HORAN: I don't understand the relevancy of that, your Honor. I don't object.

MR. ROSENSTOCK: One of our positions really is maybe Meggle is really the party in interest and they should at least have been made a party to the lawsuit.

THE COURT: Assume I accept the testimony of the first witness that he was acting for the bank, does it make any difference that these people didn't know it? I can see how it is relevant if--

MR. ROSENSTOCK: Maybe I will present that argument in a brief, your Honor, after the trial.

THE COURT: All right.

MR. ROSENSTOCK: That is all I have.

MR. HORAN: On that point, your Honor, the defense in the answer is that the defendant was the agent

of the bank, the defendant, not the plaintiff, so I don't think they can have it both ways.

THE COURT: You want to cross-examine?

MR. HORAN: No, your Honor, I have no questions of this witness.

THE COURT: Thank you.

THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: Next witness.

MR. ROSENSTOCK: Mr. Silver.

J O S E P H S. S I L V E R, called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENSTOCK:

THE COURT: You are still under oath.

Q Mr. Silver, you testified before that you are the sales manager for Amtraco?

A Yes, sir.

Q You have been sales manager for how long?

A A little over four years.

Q Could you just briefly describe your duties and functions as sales manager for Amtraco?

A I buy and sell various agricultural commodities,

including such things as dairy products, vegetable oils and fats, grains, et cetera, et cetera.

Q Prior to--

THE COURT: Including lactose, I take it?

THE WITNESS: Lactose is a dairy product.

Q Does Amtraco deal in edible lactose in a substantial amount?

A Yes, they do.

Q They buy and sell a lot of it?

A They buy and sell. In the course of business it is bought and sold.

Q Prior to coming to Amtracto what was your occupation?

A I was doing the same type of work with another firm, a rice mill, and prior to that with an international trading house.

Q So your professional life has been involved in this field, is that correct?

A Yes.

Q Are you familiar with the publication by the name of Oil, Paint and Drug Reporter?

A Yes, I am.

Q Could you describe what that publication is?

A That report is a weekly digest which lists the

prices of commodities weekly, various commodities, such as -- commodities in the oil, paint and drug field, such as oils, drugs, et cetera, et cetera.

Q That includes edible lactose?

A Yes, sir.

Q Is this report known by any other name?

A The name was changed to Chemical Marketing Newspaper. But on the front page it still shows the Oil, Paint and Drug Reporter.

THE COURT: Are you offering this to establish prices?

MR. ROSENSTOCK: Yes, your Honor.

THE COURT: I assume you concede it?

MR. HORAN: I don't know where he is headed with tis or for what period of time. The prices that we sold it at are now a matter of record.

MR. ROSENSTOCK: That's right, your Honor, but we are going to show that if they had taken normal precautions they could have easily sold the lactose within a month, two months.

THE COURT: Without arguing the relevancy, I assume that you concede that these publications which he is talking about --

MR. HORAN: Say what they say.

THE COURT: Say what they say.

MR. HORAN: I don't concede the relevancy of the line of inquiry.

THE COURT: I understand that. But let's cut short the foundation.

MR. HORAN: I accept the documents.

MR. ROSENSTOCK: Maybe I can just explain on the record. I put them into three groups. Then it will be easy and then we can just stipulate.

First the publication is put out on a weekly basis and I have listings on a weekly basis for the period between October 4, 1971 and August 28, 1972, and that is Defendant's Exhibit BBBB for identification.

THE COURT: Do you have a tabulation?

MR. ROSENSTOCK: Yes, I have a summary for each of these groups.

THE COURT: Why don't you just offer the summary?

MR. ROSENSTOCK: All right. The summary for that period is WWW and that shows the market price for edible lactose for this period.

The second summary sheet refers to the period February 5, 1973 through May 28, 1973, which at that time I thought was when most of the goods were sold.

I don't know if that is going to hold up. In any event, that is the second summary report. That is Exhibit XXX.

THE COURT: Subject to your objection as to relevancy, you have no objection to these?

MR. HORAN: Subject to that objection, no.

THE COURT: Received without prejudice to your position.

xx (Defendant's Exhibits WWW and XXX received in evidence.

MR. ROSENSTOCK: That is all for Mr. Silver.

THE COURT: Do you have anything?

MR. HORAN: No, I have no questions of him.

MR. ROSENSTOCK: Your Honor, could I just have a short five-minute recess to talk to my last witness? I think we will be able to finish today.

THE COURT: O.K.

(Witness excused)

(Recess)

V I C T O R S. N A J D A, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENSTOCK:

Q Mr. Najda, what is your occupation?

A I am a broker.

Q Do you have your own company?

A Yes, sir.

Q What is the name of your company?

A Victor Najda, Inc.

Q How long have you been head of this company, ran this company?

A Since 1967.

THE COURT: This is the broker that put through that deal that fell through?

MR. ROSENSTOCK: No. I hope not.

Q Please describe what a dairy broker does.

I'm sorry.

Are you a dairy broker?

A Yes, mainly.

Q Can you describe what a dairy broker does?

A Puts deals together between buyers and sellers, both domestically and internationally.

Q Is there also a term dairy agent?

A Yes.

Q Can you just tell us what the difference is

between an agent and a broker?

A Well, I am an agent in the case where I represent a particular firm.

I am an agent for three firms.

The difference berween an agent and a broker is that an agent represents the one party while a broker represents both parties to the transaction.

Q Are you familiar with a product called edible lactose?

A Yes, sir.

Q Could you just describe what edible lactose is?

A Well, it is basically milk sugar.

Q What is it used for?

A It is used in food preparations, it is used as an artificial sweetener, a big use, it is used in the drug field.

Q Do you--

THE COURT: What do you mean by artificial sweetener?

THE WITNESS: Well, this Sweet and Low.

THE COURT: You mean low calorie?

THE WITNESS: Correct.

Q Edible lactose is specifically a dairy product, is it not?

A That's right.

Q Do you as a broker deal in edible lactose to a substantial extent?

A Yes. As a matter of fact, we are agents for a Dutch firm.

Q That manufactures edible lactose?

A That's right.

Q As a dairy broker have you ever represented the U. S. dairy industry in any capacity?

A Yes. I represented the United States dairy industry at an international fair in Cologne.

THE COURT: What is the United States dairy indusry? Is that an organization?

THE WITNESS: Actually there is a trade organization called Dairy Society International which works together with the United States Department of Agriculture and Agriculture would pay all the expenses connected with my trip.

THE COURT: United States industry is just an amorphous mass?

THE WITNESS: That's right.

Q Other than this function do you do any other work for the dairy industry as the general term is used?

A We receive telephone calls regularly from the

U. S. Department of Agriculture asking us what are the market prices.

MR. HORAN: Your Honor, I will concede this man knows a lot about the dairy industry.

THE COURT: I assume you are establishing him as an expert?

MR. ROSENSTOCK: Yes. I am almost finished, but I might as well finish off.

Q In other words, you are one of the brokers that are conferred with in order to determine market prices of commodities, is that correct?

A Yes.

Q Is edible lactose a commonly used product?

A Yes.

Q On a day-to-day basis is there a demand for the lactose?

A Yes, there is.

Q Is it constantly being bought and sold every single day just about?

A Just about.

Q If a person wanted to sell lactose, edible lactose, what would be the normal procedure that he would follow?

A Well, I suppose--

MR. HORAN: I object to the relevancy, although there is something wrong with the form too.

THE COURT: I imagine he is offering this witness to show that you could have sold that lactose by picking up a phone and telling a broker to sell it.

MR. ROSENSTOCK: To a certain extent that is true.

MR. HORAN: I guess that is almost self-evident.

MR. ROSENSTOCK: We will also establish what is commercially reasonable is to have done that and what they did instead was to hold onto it for an incredibly long period of time. There is just no business reason for doing so. I think that is going to be important in determining what damages if any they might be entitled to, assuming there is any liability.

MR. HORAN: Your Honor, he can't possibly hypothesize about this particular situation.

THE COURT: It seems to me he could if it was properly asked.

MR. HORAN: Perhaps, but I cannot see feeding the right constellation of facts because --

THE COURT: Let's wait until we see what the question is.

Q I am just asking in general now what is the normal procedure that a person would follow in arranging

for the sale of lactose, edible lactose.

A Well, if a person was not in the business then they would call up a broker who is in the business to handle the sale.

Q Is lactose a product that can be sold at any time, assuming you contacted a broker?

A Yes.

Q This was true in 1971 and 1972 as well?

A That's right.

Q Generally how long does it take to effect a sale of lactose?

A Well, it depends on the market conditions, but not very long, say a week or two weeks.

THE COURT: There is not an exchange where it is sold like the cotton exchange or the sugar exchange?

THE WITNESS: No.

Q Is the quantity, the amount being sold, a factor in determining how long it might take to dispose of it?

A Yes.

Q In this particular instance the amount of lactose involved is 503.8 metric tons. Is that considered a large amount of edible lactose?

A Not particularly.

Q Is it an average type of amount that is sold

normally?

A It is a good quantity.

MR. HORAN: I object. To whom, in what context?

MR. ROSENSTOCK: On the market, your Honor.

The point is that the German bank's obligation at that point was to go on to the general market and attempt to sell the lactose using normal procedures that are available. If they didn't do this, if they waited, as apparently they have, sold it much later, then it means, (1) the sale has no bearing on the amount of damages they sustained, and (2) they are not entitled to any storage cha-ges or very little, and I think these are the factors that have to be conisdered.

THE COURT: Without ruling on the validity of your position, I will permit you to proceed.

Q In determining the market price of lactose is it customary to refer to the Oil, Paint and Drug Reporter as one indication of market price?

A Well, it is a good guideline, it is a reflection, say, as to what is going on in the market, yes.

THE COURT: It isn't like the Stock Exchange quotations?

THE WITNESS: No, it is accurate within let's say one or two cents a pound, something like that.

Q In determining the price of lactose does the age of the lactose or how old it is have any bearing on the price one is able to obtain?

A Certainly.

Q To what extent?

A Well, it is not a product that improves with age. Just the opposite. You are dealing here with basically what is sugar and you cannot leave it around for a very long period of time.

THE COURT: It is not like a good wine?

THE WITNESS: No.

Q If Lactose was approximately nine to twelve months old or in storage for that time would that affect its value on the market?

A You mean in storage for such a period of time?

Q Yes.

A Yes, I think so, because it is the storage plus shipping time, manufacturing time, et cetera, so from the time it was manufactured it is quite a bit of time.

THE COURT: How old does it have to get before it gets unmarketable?

THE WITNESS: Well, I don't think that it is -- let's say as a good broker I will never admit that anything is unmarketable. There is always a market.

A-125

Q That is assuming it is still a good quality?

MR. HORAN: Your Honor, I object to this because there is no issue here as to the quality of this lactose.

THE COURT: His point I assume is by keeping it so long you increased your damages.

MR. HORAN: There is some implication that age per se affects the quality.

THE COURT: That is what he is saying.

MR. ROSENSTOCK: I am saying it affects the marketability. We are not saying there is anything wrong with the lactose. It is not a point that we have raised.

THE COURT: You are saying that every day it is kept reduces its value?

MR. ROSENSTOCK: That's right.

THE COURT: Is there any correlation between age and value? There is no table, is there?

THE WITNESS: No.

THE COURT: If it is six months old is it materially less valuable than if it was three months old?

THE WITNESS: No, you cannot pin it down. The only problem, if you leave merchandise around for a long time and let's say the trade becomes aware that this merchandise is around, then you can have problems, of course.

THE COURT: Because they know --

THE WITNESS: Because everybody and his uncle has been around trying to sell this merchandise and the buyer says, "Oh, I have heard of this from ten sides. I don't want it."

Q Assuming the lactose in this situation was approximately nine to twelve months old, how do you think that would affect its market price in terms of the reported market price versus that particular lactose's market price?

A Well, assuming that the quality was perfectly fine, as a rule of thumb I would say it is about say two to three cents, maybe four cents below the market price.

THE COURT: Per what?

THE WITNESS: Per pound.

Q Would these factors affect the sale of the lactose, assuming there is no question of the quality simply because it's been around a period of time?

A No.

Q So if you knew lactose was approximately nine to twelve months old and you knew what the market price was at the time would you be able to make an evaluation as to the marketability of the lactose and what it could be sold for?

A Yes, I could.

Q Referring to Defendant's Exhibit WWW, it indicates

the sale price of lactose on November 1, 1971 was 18-1/2 cents per pound. The lactose here was in storage since I think it was January 1971.

THE COURT: That is what the witness said, January.

Q Based on these factors, assuming the quality is O.K., since there is no question about that raised here, what do you think the feasibility would be of selling that lactose in November of 1971?

THE COURT: You didn't state the quantity.

Q Assuming it was 503.8--

MR. HORAN: I object because of the omission of a material factor in the hypothetical, which is that these goods were under U. S. Customs duties and they had not been paid and they had that burden to carry along with it. That has never been presented as a factor here, but I am sure the witness would testify that it is a factor.

THE COURT: Put that in the question.

MR. ROSENSTOCK: If it is not in evidence I would question whether he should consider it.

MR. HORAN: It certainly is in evidence.

MR. ROSENSTOCK: I thought you said it wasn't in evidence.

BEST COPY AVAILABLE

MR. MORAN: It is in evidence that these goods --

MR.ROSENSTOCK: O.K.

Q Can you give, based on your own expertise, an approximation as to the selling price, taking that fact into account as well?

A Before answering the question, I don't understand the point about U. S. Customers.

Q This lactose here was shipped to the United States for export to another country, so Customs had not been paid on it.

A In other words, it was in bond but the duty had not been paid?

Q THat's right.

A But the duty could have been paid at any moment and released from bond?

Q Exactly.

A Which therefore has no bearing on the lactose itself. it is just a bookkeeping situation.

Q So it would not have any bearing. Assuming these factors then, could you give an approximation as to the market value of the lactose at that time?

A Well, I would say that you should be able to sell it at that time for not less than around 15 cents a pound.

I want to qualify this, because you are talking about an imported product. I have no way of knowing what the supply and demand factor was at this particular time.

It could have been, for instance, a situation where domestic supply was short, in which case you could sell it for a higher price.

THE COURT: Wouldn't that be reflected in the price that have you, the market price?

THE WITNESS: Well, the market price as given by the Reporter?

THE COURT: Wouldn't the shortness of supply reflect itself in the market price?

THE WITNESS: No, not necessarily, because the market price is predicated on the domestic suppliers. These people call the various plants and get the prices and if the plants simply cannot supply it they will still give the price and then the imported products have a higher value. We have done this.

Q How wide a fluctuation do you think the fact you just mentioned would cause though?

A You mean as far as higher prices go?

Q Higher or lower. I assume this would work both ways, up or down?

A As an example, we sold last December, when the

market was approximately 30 cents a pound, we sold for 35 cents a pound imported product.

Q So it could vary three to five cents you would say then?

A Yes.

THE COURT: Then the only testimony you can give with any certainty would have to be on the presumption that there was an adequate supply of domestic?

THE WITNESS: That's right, in which case you would have to sell at a slightly lower price to compete with the domestic production.

THE COURT: Assuming that to be the fact then, what would the price be?

THE WITNESS: In that case, if the domestic price was 18-1/2 cents, then your imported would be say about 3, 3-1/2, not less than 15 cents.

Q In 1971, for instance, when this transaction occurred, was there ever a time when lactose could not be sold?

A No.

Q Isn't it true--

A I mean, I don't know what the conditions were in 1971 obviously, but there is no time that lactose cannot be sold since it's used all the time.

Q Isn't it true that there is always a viable market in lactose within this reasonable fluctuation that you mentioned?

A Yes.

Q If this lactose instead of being about nine months old was between two, two and a half years old, how would that affect is value in terms of saleability?

A Well, two and a half years old, first of all, you would have -- you might have a quality problem, so far as that is concerned. So that could affect the price.

The other thing is you are obviously talking about an imported product and I think in two and a half years everybody would know that this parcel has been lying around without being sold.

Q So it would make it exceedingly more difficult to sell?

A That's right.

MR. ROSENSTOCK: I have no further questions.

MR. HORAN: I have just a couple, your Honor.

CROSS-EXAMINATION

BY MR. HORAN:

Q If you were told that this lactose was in 25 kilo bags would that affect any of your responses?

A No.

Q In other words, it could be sold in smaller lots, in your view, without any trouble, is that correct?

A What do you mean?

Q The fact that it was in smaller bags --

A Well, 25 kilo bags is 55.115 pounds and the normal U. S. package is 50 pounds.

Q So there isn't a material difference?

A No.

Q Isn't it true though that if these goods were subject to the Customs duties that that would affect the price that a buyer would be willing to pay, someone has to absorb those costs?

A This I don't think has anything to do with what the buyer is willing to pay. He couldn't care less.

THE COURT: The seller.

Q The seller wants more obviously, doesn't he? He wants to clear Customs?

A That's a very funny way of puttingit, because it is as though the seller was working on only a particular margin and whatever each cost is he keeps adding. This is not the way you do it.

THE COURT: You get what you can get?

Q You get what you can get, but it would be a factor that the duties have to be paid, a factor in the

negotiations.

A It hasnothing to do, as far as I can see, in se-ling in the United States,because whatever you want to sell here, you have to pay the duty.

THE COURT: In other words, a seller wants to get as much as he can. The fact that he is going to get less net doesn't help him any.

THE WITNESS: It's almost like saying if you sell it F.O.B. Rotterdam or you sell it duty paid here you would have to keep adding the costs.

Q If you were told that lactose was contracted for in September 30, 1971 for a total of $95,000, whatever the quantity was, and that that same quantity was sold over the course of two and a half years for approximately $80,000 can you draw any conclusion about that?

MR. ROSENSTOCK: Objection, your Honor. I don't really understand the question. It is just sort of throwing facts up in the air.

MR. HORAN: These are facts that are in evidence. The price that was on the contract that is in issue here was a total of $95,000.

THE COURT: Let me hear the question.

Q The qustion is if you were told that the ultimate proceeds of sale of this lactose over the period of

two and a half years varied by $15,000 for a quantity of 503 metric tons would you regard that as a large variance?

A Well, the figures don't mean anything to me unless I relate it on a cents per pound basis.

Q I'm sorry to be using foreign measurements,but that is what we have, 503 metric at 19 cents per kilo, that was the price.

A But the only comments I can make is why sit on this merchandise for two and a half years.

Q You have no idea why that happened, do you?

A No.

Q You can't have any any idea?

A No.

Q But it is possible, isn't it, that it was hard at certain times to find a buyer? You don't have any knowledge whether it was or wasn't during 1971 and 1972 for this particular lactose?

A Well, asusming again that the quality was in order, I don't see any reason why it should have been hard to find a buyer. It all depends how it was attempted.

Q It depends how you did it?

A Yes.

MR. HORAN: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. ROSENSTOCK: No redirect.

THE COURT: Thank you.

(Witness excused)

MR. ROSENSTOCK: Defendant rests, your Honor.

THE COURT: Any rebuttal?

MR.HORAN: No. Plaintiff rests.

THE COUT: Do you want summations?

MR. ROSENSTOCK: I think we should submit briefs, your Honor.

THE COURT: Without making any findings of fact, I will just disclose my ingorance so you can aim at it.

It seems to me as though the plaintiff has established its case on liability. The two contracts on their face, talking of 1 and 13, seem to me to be absolute sales.

There is ambiguity in the last-- I will call it a paragraph, although it is not really a paragraph -- the last three lines of the terms, but the document appears on its face to have been drawn by the defendant and therefore the ambiguity, if any, should be resolved against it.

I think it was the next-to-the-last witness, who was called by defendant, who referred to defendant's business as the buying and selling of commodities, specifically, lactose, and that is what these documents seem

to me to purport to do.

In other words, if I sell stock to a broker and get a confirmation indicating that he, the broker, has bought my stock, the mere fact that he simultaneously sold it to someone else would seem to me to be no concern of mine.

If someone else welshed on the deal that would seem to me to be the broker's headache.

The more you look at these last three lines, they seem to specify the time of payment, the only condition being that they pass the Canadian Government authorities, and that condition was waived when it wasn't presented to the Canadian Government authorities for approval, it seems to me.

As I say, I am not making a finding. I am just exposing my views so you can show me to be in error if I am.

On the question of damages, on the other hand, it seems to me the defendant has a better position. Something would turn on who has the burden of proof and I am not sure. Has the plaintiff got the burden of proving that he mitigated or does the defendant have the burden of proving that the plaintiff didn't mitigate? In the latter situation, of course, the defendant would be in a better position, but even without that I am not sure.

jh:mq

It would certainly seem to me that the defendant established a ceiling on the damages when it made an offer to buy, the best offer to buy that it made. Certainly plaintiff was under no obligation to accept that offer and could gamble with the future, but I don't really see why it should be authorized to gamble on the defendant's credit.

Those are just my offhand impressions. I don't see that there is any issue of credibility before me, so I don't have to comment on that. I don't recollect any reason for disbelieving any of the witnesses that appeared before me.

The last witness impressed me as a very knowledgeable broker. I am not quite certain what the relevancy of his testimony is, but to the extent that it is relevant both parties can assume that I credited his testimony, because it seemed to me he was both knowledgeable and candid.

Unless either side wants to ask me to elucidate my ignorance further, we will have a briefing schedule.

What do you suggest on that?

(Discussion off the record)

THE COURT: I will ask counsel to set a schedule for the briefs, of course, acting in good faith with each other, trying to expedite it.

.....

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Dominic Capezza--interpreter.				
Hans Theo Baumann	6	24		
Fabio Bohorquez	47	61		
Joseph S. Silver	68			
(recalled)	101			
Ricardo Jove	73/84			
Victor S. Najda	106	120		

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
1		12
2	22	23
4		52
5,6		54
7,8		55
9		56
10		58
11		59
12		60
13		70
14,15,16		81

EXHIBIT INDEX

Defendant	Identification	In Evidence
A,B	31	
G,H	33	
F		34
S		37
T		41
Y		44
AA	44	44
FFF	64	64
A	65	66
B	66	67
VVV & N		90
O,P	92	
OO,QQ,RR		95
BBB		97
DDD		99
WWW & XXX		105

A-139

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
JAN 27 1976
S.D. OF N.Y.

BANK FUR GEMEINWIRTHSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

- against -

AMTRACO CORP.,

Defendant.

MEMORANDUM AND ORDER

72 Civ. 2441

#143783

KNAPP, D.J.

In this breach of contract case - involving the alleged sale of 503.8 metric tons of edible lactose - there are essentially two issues to be resolved: (i) was the relationship between plaintiff, a German bank seeking to dispose of 503.8 metric tons of edible lactose in its inventory, and defendant, a New York commodities merchant, that of seller and buyer; or was defendant simply acting as plaintiff's agent or middleman in agreeing to dispose of the goods in question on condition it could locate a buyer; and (2) if defendant did purchase the goods for its own account and not simply as plaintiff's agent, for what, if any, damages is it now liable to plaintiff for its failure to pay for them.

I. Liability

After reviewing the evidence and post-trial briefs I have concluded that defendant did purchase the goods in question for its own account and not as plaintiff's agent, and that defendant's failure to accept delivery frustrated the condition that it present the goods to Canadian customs, thereby not relieving it from its obligation under the contract. The following findings of fact are in support of this conclusion:

1. On or about September 30, 1971, plaintiff, through its agent, Molkerei J.A. Meggle, a commodities merchant with principal offices in the Federal Republic of Germany, entered into an agreement with defendant, an experienced commodities merchant in the business of buying and selling dairy products, including lactose, by which plaintiff agreed to sell and deliver to defendant 503.8 metric tons of edible lactose. Plaintiff also agreed to assume all costs of storage of said lactose through October 20, 1971, while the defendant was to absorb any customs fees.

2. In consideration of plaintiff's undertaking to sell and deliver said lactose at a storage warehouse located in New Jersey and to assume said storage costs, defendant agreed to pay to plaintiff's agent, American Bank & Trust Company, 70 Wall Street, New York, New York, the sum of $95,722.

3. This transaction was evidenced by a document - prepared by defendant and on its stationery - which was entitled a "purchase confirmation". The terms of the parties' arrangement were:

> 503.8 metric tons at $.19 a kilo (or $96,722 for the entire lot), to be stored at plaintiff's cost until October 20, 1971, thereafter cost to defendant; payment to be made to American Bank & Trust Co. in New York, subject to the trust receipt to be executed by defendant, "after goods have passed inspection of the Canadian Government authorities, upon delivery." (Plaintiff's Exhibit

4. Defendant accepted the goods sold upon its execution of the trust receipt referred to in the "purchase confirmation" on October 7, 1971, at which time title, by means of plaintiff's warehouse receipts and various documents of chemical analysis of the goods, was transferred to defendant.

5. The terms of the contract required defendant to present the goods to Canadian customs and to make payment to the American Bank & Trust Co. after the goods had passed Canadian inspection.

6. Said contract made no mention of delivery to any third party.

7. On September 30, 1971, defendant had negotiated a simultaneous sale of the same goods to a Canadian purchaser.

8. Defendant never presented the goods to Canadian customs for inspection or asked plaintiff to do so - even though plaintiff was at all relevant times willing and able to do so - apparently due to a default by its Canadian customer.

9. Defendant does not contend that the lactose would not have passed inspection if it had been presented.

On the basis of the foregoing, it is the conclusion of this court that the ability of the goods to pass customs inspection was the only condition precedent to defendant's obligation to pay; and that by its failure to ask that the goods be presented for inspection, the defendant waived that condition, and cannot now assert its non-performance as a defense. Amies v. Wesnofske (1931) 255 N.Y. 156, 162, Clark v. West (1908) 193 N.Y. 349; Young v. Hunter (1852) 6 N.Y. 203.

Moreover, the contract simply provides for payment upon delivery - a matter which would have been wholly within plaintiff's control had it been asked to make delivery - and says nothing about acceptance by any third party. Under these circumstances, the cases cited by defendant seem inapplicable.

The defendant, having failed to accept delivery of the goods, is liable to plaintiff for non-payment.

II. Damages

Focusing on the question of damages, both parties agree that the measure thereof is the difference between the contract price and the resale price - provided the resale is made in a "commercially reasonable manner" - plus any incidental damages, such as storage fees. New York UCC §2-706. I find that the burden of proof with respect to whether the method of resale was proper is upon the seller, the plaintiff in this instance. Wurlitzer Company v. Oliver (W.D. Pa. 1971) 334 F.Supp. 1009, 1012; Anderson, Uniform Commercial Code §2-706;8 (1971); New York UCC §2-706.[1/] According to Subsection 2 of §2-706, this burden encompasses the obligation to demonstrate that "every aspect of the sale, including the method, manner, time, place and terms" were "commercially reasonable".

In attempted discharge of its burden, plaintiff relies simply on the documentation of the time and terms of the resales it did eventually consummate over a two-year period. All we know with respect to the background of these sales is that the matter was put in the hands of a certain Mr. Silverman, a non-broker. Assuming - although the record is rather sparse on this - that Silverman was the best (or at least an appropriate) person to handle the matter,

there is no evidence from him or anyone else as to what efforts he in fact made to resell the goods. All we do know is that after a long time (and a great deal of storage expense) he finally did sell it. This clearly is not enough to satisfy plaintiff's burden.

Had defendant elected to rest at the close of plaintiff's case, it might well be that plaintiff's damage claim would have to have been dismissed for failure of proof. However, the evidence offered by defendant seems to us to provide a basis for determining what damages plaintiff must necessarily have suffered from the breach of contract despite its best efforts to mitigate. Defendant's Exhibits WWW and XXX, plus the testimony of its expert Mr. Najda, establish that the market price for edible lactose during the period immediately after the breach was significantly below the contract price. Moreover, defendant's unconditional offer of June 30, 1972 to purchase the entire lot without requiring plaintiff to waive any of its claims (defendant's Exhibit BBB) is clear evidence of the value defendant placed on the lactose in question: namely, $165/ton, or approximately $83,160.

Such offer also serves to place a ceiling on defendant's liability for storage costs, service fees and insurance costs. In this connection, it is not significant that the defendant - rather than some stranger - made the offer. The significant fact is that

plaintiff had an opportunity to dispose of the lactose (and thus eliminate further costs) and has suggested no sound reason for failing to avail itself of such opportunity.

Judgment will accordingly be entered for the difference between the contract price ($95,722) and the price offered in defendant's Exhibit BBB, plus storage charges, insurance costs and service charges to American Bank and Trust Co. attributable to the period October 21, 1972 to June 30, 1972.[2/] The parties can presumably agree upon a computation pursuant to this formula. Plaintiff is directed to submit a proposed judgment on ten days notice to defendant.

The foregoing shall constitute my Findings of Fact and Conclusions of Law pursuant to F.R.C.P. 52.

SO ORDERED.

Dated: New York, New York
January 26, 1976.

WHITMAN KNAPP, U.S.D.J.

add fees for drawings

A-146

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

BANK FUR GEMEINWIRTHSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

-against-

AMTRACO CORPORATION,

Defendant.

----------X

72 Civ. 2441 (WK)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Lawrence M. Rosenstock sworn to the 24th day of February, 1976, together with all the exhibits annexed thereto, the memorandum of law of defendant Amtraco Corporation, the memorandum and order of the Hon. Whitman Knapp dated January 26, 1976 and upon all the prior papers and proceedings heretofore had in this action, the undersigned attorneys for the defendant will move this court in room 905 of the United States Courthouse, Foley Square, New York, New York, on the 5th day of March 1976 at 2:00 o'clock P.M. or as soon thereafter as counsel can be heard pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure for an order granting defendant's application requesting the court to amend its findings of fact and conclusions of law, make new findings of fact and conclusions of law, take new evidence to the extent necessary and direct entry of a new judgment with respect to the

trial of this action dismissing plaintiff's case on the grounds that plaintiff failed to establish its entitlement to damages and for such other and further relief as to the court may seem just and proper on the grounds that the court's memorandum, decision and order on the issue of damages is based upon erroneous findings of fact which are directly contrary to the evidence presented at trial and upon misapplication of the remedies provided for breach of contracts by a buyer under the uniform commercial code.

Dated: New York, New York
February 26, 1976

LIEBMAN, EULAU, ROBINSON & PERLMAN

By _____
A Member of the Firm
Attorneys for Defendant
32 East 57th Street
New York, New York 10022
(212) 355-5522

TO: FOX GLYNN & MELAMED, ESQS.
Attorneys for Plaintiff
299 Park Avenue
New York, New York 10017
(212) 593-6600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

BANK FUR GEMEINWIRTHSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

-against-

AMTRACO CORPORATION,

Defendant.

----------X

72 Civ. 2441 (WK)

A F F I D A V I T

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

LAWRENCE M. ROSENSTOCK, being duly sworn, deposes and says:

1. I am a member of the firm of Liebman, Eulau, Robinson & Perlman, attorneys for the defendant Amtraco Corporation (hereinafter "Amtraco") and submit this affidavit in support of Amtraco's motion pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure to request the Court to amend its findings of fact and conclusions of law, make new findings of fact and conclusions of law, take new evidence to the extent necessary and direct entry of a new judgment with respect to the trial of this action.

2. This is an action brought by plaintiff Bank Fur Gemeinwirthschaft Aktiengesellschaft (hereinafter "BFG") against

Amtraco for breach of a sales contract based upon Amtraco's alleged failure to accept delivery and pay for 503.8 metric tons of edible lactose. By memorandum decision and order dated January 26, 1976, which the court deemed its findings of fact and conclusions of law, the court ruled that Amtraco was liable to BFG for breach of contract and directed the entry of judgment in BFG's favor against Amtraco consisting of the difference between the contract price and the price Amtraco subsequently offered to purchase the lactose, amounting to approximately $12,595, the storage charges, insurance costs and service charges BFG incurred for a period of eight months after the alleged breach occurred in the sum of approximately $24,182.63 and interest, costs and disbursements. Based upon these findings, the total judgment that will be entered against Amtraco will be in excess of $40,000.

3. While plaintiff respectfully disagrees with the court's findings and conclusions with respect to the issue of liability, the present application is directed particularly to the question of damages. As will be demonstrated below and in Amtraco's accompanying memorandum of law, the court's decision on the issue of damages is based upon erroneous findings of facts which are directly contrary to the evidence presented at trial and upon misapplication of the remedies provided for breach of contracts by a buyer under the Uniform Commercial Code.

4. The propriety of the present application is underscored by the fact that at the close of BFG's case Amtraco moved

to dismiss BFG's action on all grounds available and the Court, after reserving judgment, (R. 83-84) found in its decision that the evidence offered by BFG with respect to damages "clearly is not enough to satisfy plaintiff's burden" (p. 6 of Court's Decision). Thus, the court of necessity must have ruled upon the evidence offered by Amtraco. However, the only evidence offered by Amtraco with respect to damages after BFG rested established that (1) the market price for edible lactose during the period immediately after the breach was not as the court found, significantly below the contract price, but equal to, if not greater than the contrac price and (2) BFG could have disposed of the lactose within a few weeks after the alleged breach occurred and therefore could have avoided the substantial storage charges it incurred. No evidence was presented by Amtraco whatsoever in any sense indicating that it was reasonable for BFG to retain the lactose for eight months or that BFG was attempting to dispose of the lactose in a reasonable manner. Thus, the only logical and possible conclusion that could be reached from the Court's findings was that BFG failed to establish its entitlement to any damages.*

*In computing damages the court referred to a letter of Amtraco's sent eight months after the alleged breach occurred, defendant's exhibit BBB, in which Amtraco offered to purchase the lactose from BFG, without prejudice, for the sum of $165 per metric ton as establishing Amtraco's maximum liability. This exhibit was offered in response to BFG's Exhibit 14 which contained an earlier proposal by Amtraco, again without prejudice, to purchase the lactose at $150 per metric ton. However, as shown in Amtraco's accompanying memorandum of law, neither Amtraco's exhibit BBB nor BFG's exhibit 14 could properly be a factor in the court's determination as to whether there was sufficient evidence as to the resale or market price of the lactose eight months earlier or as to the propriety of the time and manner of the resale. Furthermore, even if the prices referred to in these exhibits could be used by the court in determining the resale or market price at the time of the alleged breach, BFG would still not be entitled to recover its storage charges, insurance costs and service charges for an eight month period since no showing was made that such charges were commercially reasonable as defined by the court in its decision and by UCC §§ 2-706 and 2-710.

5. The legal discussion with respect to the applicability of the remedy provisions of the Uniform Commercial Code (See UCC §§2-706, 2-710) are set forth in Amtraco's accompanying memorandum of law and in summary includes the following:

(a) Since the court found that BFG failed to meet its burden of proof or to show that BFG's resale of the goods was commercially reasonable with respect to manner, time, place and terms, BFG cannot recover under UCC §2-706 regardless of the fact that Amtraco offered to purchase the goods without prejudice at a particular price eight months after the alleged breach occurred. This proposal by Amtraco can in no sense be deemed an admission by Amtraco that eight months was a reasonable time for PFG to retain the goods or that BFG could not have disposed of the goods immediately after the breach occurred at a more advantageous price.

(b) UCC §§2-706 and 2-710, which authorize the award of incidental damages including storage charges, require such storage charges to be "commercially reasonable". As the court itself found, BFG failed to establish in any manner that it was commercially reasonable to retain the lactose for an eight month period, particularly in light of the fact that the storage charges for such

lactose during this time were approximately $2,700 per month and amounted to approximatly $22,775. Indeed, the uncontradicted testimony of Amtraco's expert, Mr. Najda, established that the lactose in question could have been disposed of within a few weeks at a price equal to, if not greater than, the contract price. Thus, BFG is in no sense entitled to the storage charges for this eight month period of time.

(c) The court's finding that Mr. Najda's testimony and defendant's exhibits WWW and XXX demonstrated that the market price for lactose during the period immediately after the breach was significantly below the contract price (court's opinion, p. 6) is directly contrary to what these exhibits and Mr. Najda's testimony established. These exhibits and Mr. Najda's testimony, which was unrefuted by BFG, conclusively establish that the market price for lactose not only immediately after but for several months after the alleged breach was equal to, if not greater than, the contract price and could have been sold within a few weeks after the alleged breach occurred for an amount equal to or greater than the contract price. Thus, no evidence whatsoever exists to support this finding.

(d) The price offered by Amtraco in its June 30, 1972 letter (defendant's exhibit BBB) cannot in any sense be used as a basis for computing damages. That price certainly cannot be considered under UCC §2-708 relating to the difference between the market price and the contract price at the time of breach since that breach occurred eight months prior to such offer. Likewise, that price cannot be used under UCC §2-706 since, as the court found, BFG failed to show that it resold the goods in a commercially reasonable manner.

The court's finding that defendant's exhibits WWW and XXX and the testimony of Mr. Najda, Amtraco's expert, established that the market price for the edible lactose immediately after the breach was significantly below the contract price is directly contrary to the unrefuted evidence presented by Mr. Najda and by these exhibits.

6. At trial Amtraco offered into evidence weekly copies of the Chemical Marketing Reporter to establish the market price of edible lactose for the period immediately following the time of the alleged breach on October 20, 1971 through August 28, 1972 (defendant's exhibit WWW)*

*Defendant's exhibit XXX shows the figures listed in the Chemical Marketing Reporter for the period February 25, 1973 through May 28, 1973. However, these figures are not pertinent for purposes of the present discussion.

Rather than clutter the record with numerous copies of the Chemical Marketing Reporter itself, counsel for BFG and Amtraco stipulated to put into evidence a summary sheet listing the market price of the lactose listed in the Chemical Marketing Reporter (R. 104). This summary sheet was defendant's exhibit WWW and shows that for the five month period following the time of the alleged breach the market price for edible lactose was approximately 18-1/2¢ per pound.

7. It should be noted that the summary sheet itself inadvertently failed to specifically state that the 18-1/2¢ price there stated was based on dollars per pound rather than dollars per kilo. However, it was clear from Mr. Najda's testimony that the prices listed in the Chemical Marketing Reporter and which were summarized in defendant's exhibit WWW were in fact prices per pound and not prices per kilo. (See R. 112 where Mr. Najda stated that the price listed in the Chemical Marketing Reporter was accurate within "one or two cents a pound"; R. 115-116 where counsel in referring to exhibit WWW states that it refers to price per pound and Mr. Najda responds accordingly; R. 119) Furthermore, even if there was doubt as to this particular point, which there certainly is not, the equitable procedure to follow would be to permit the copies of the Chemical Marketing Reporter itself to be deemed marked in evidence since defendant's exhibit WWW is only a summary of that report and was marked in lieu of the Chemical Marketing Reporter as a convenience to the court and to

the parties. A copy of one of the issues of the Chemical Marketing Reporter which is contained in the summary is annexed hereto as exhibit A for the court's consideration. As a review of this exhibit conclusively demonstrates, the prices listed in the Chemical Marketing Reporter are prices per pound rather than prices per kilo.

8. Since the prices listed in the contract between Amtraco and BFG and in the various correspondence between Amtraco and BFG including defendant's exhibit BBB and plaintiff's exhibit 14 are quoted in terms of dollars per kilo rather than dollars per pound, an arithmetic conversion is necessary in order to correlate the market price listed in the Chemical Marketing Reporter (defendant's exhibit WWW) and referred to in Mr. Najda's testimony with the contract price. Once this correlation is made it is absolutely clear that the market price of edible lactose immediately following the alleged breach and for several months thereafter was not as the court found, "significantly below" the contract price but was equal to, if not greater than, the contract price.

9. This conclusion is demonstrated by the following calculation (see additionally discussion of this point in pp. 15-20 of Amtraco's post trial brief and pp. 5-7 of Amtraco's reply brief). It is clear that one metric ton is equal to 2,204.6 pounds and that one kilogram is equal to 2.2046 pounds. Since the contract

between BFG and Amtraco involved 503.8 metric tons this amount converted into pounds is equivalent to 1,110,674 pounds of lactose. Based upon the purchase price of the lactose listed in the contract of $95,722, the price per pound for lactose under the contract computes to approximately 8-3/5¢ per pound.

10. At the time the alleged sale occurred, however, and for several months thereafter the market price listed in the Chemical Marketing Reporter was 18-1/2¢ per pound, significantly above, rather than below the contract price. However, Mr. Najda testified that this normal market price would have to be adjusted because of variations in the domestic market (R. 119) and because this lactose had been in storage for approximately nine months (R. 115). Based upon these factors Mr. Najda testified that the price for the particular lactose in question would be between 5¢ and 9¢ less than the market price listed in the Chemical Marketing Reporter or between 9¢ and 13¢ per pound. Mr. Najda also stated that there is always a viable market in lactose within this fluctuation range (R. 120). Thus, it is clear that contrary to the court's finding, the unrefuted testimony established that the market price for edible lactose during

*Amtraco's contract price with the Canadian buyer was approximately 12¢ per pound (plaintiff's exhibit 13, R. 69-70).

the period immediately after the breach was not "significantly below" the contract price but was equal to if not greater than the contract price.

11. Mr. Najda also testified that there is always a viable market in lactose, that lactose was sold on a daily basis and that the lactose here could have been sold within two to three weeks after the alleged breach occurred (R. 111). This evidence was in no way refuted by BFG and as the court itself determined, BFG failed to show that it made any efforts to sell the lactose in a commercially reasonable manner (court's opinion, p. 6).

12. In view of this uncontroverted testimony it is clear that BFG could have disposed of the lactose for an amount equal to if not greater than the contract price within one to three weeks after the alleged breach occurred. Certainly then, BFG should not be permitted to recover storage charges amounting to approximately $22,000 for eight months after that date and to recover the difference between the contract price and the price Amtraco offered to purchase the goods eight months after the alleged breach occurred. Such a conclusion would be directly contrary to the uncontroverted facts, would in no sense be supported by the evidence presented and would unduly reward BFG for its failure to dispose of the lactose in a commercially reasonable manner.

13. Additionally BFG did not meet its burden of proof under UCC §2-706(3) by establishing that it gave Amtraco notice of its intention to resell the lactose. Thus it cannot recover on this basis as well.

14. At the conclusion of BFG's case Amtraco made a motion to dismiss on all grounds available to it. The evidence offered by Amtraco after this motion in no sense rectified BFG's failure to establish its right to damages. Indeed, as noted above, the evidence offered by Amtraco, if anything, demonstrated the propriety of dismissing BFG's case for failure of proof. It is therefore, respectfully submitted that for the reasons set forth in this affidavit and in Amtraco's accompanying memorandum of law, BFG's claim should be dismissed for failure to establish its entitlement to damages.

s/
Lawrence M. Rosenstock

Sworn to before me this
24th day of February, 1976

s/
Notary Public

Commission Expires March 30, 1977

costing, same basis ...ton. 40.00 -41.00
No. 2 coating .....ton. 32.00 -33.00
No. 3 coating .....ton. 31.00 -32.00
filler, gen'l purpose, same basis. ton. 19.50 - —
delaminated, water washed, uncalcined, paint grade 1 micron avg., same basis ton. 67.00 - —
dry-grd., airfloated, soft, same basis. .....ton. 14.00 - —
Kaolin, NF, powd., 50-lb. bgs., 5,000-lb. lots, works lb. .06¾- —
NF, colloidal, 150-lb. dms., works. lb. .16½- —
Karaya gum, No. 1, powd., bbls. lb. .80 - .90
No. 2, powd., bbls. .....lb. .70 - .83
No. 3, bbls. .....lb. .63 - .76
Koch acid, dms., frt. alld., 100% basis. .. lb. 1.00 —
Kola nuts, bgs. ... .lb. .15 .18

L

L acid bbls., works lb. 2.25 —
Lacquer diluent, petroleum, 140°F.-200°F. b.r., tankcars, New Jersey and NewYork gal. .18 - .19
Group 3 .... gal. .17125- .18125
Houston, Texas ..... gal. .17 - .18
Lacquer diluent, petroleum 200 F.-240°F b.r., tankcars, New York and New Jersey gal. .18 - .19
Group 3 ... gal. .16125- .17125
Houston, Tex. gal. .16½- .17½
Lactic acid, food grade, 88%, tankcars, frt. equald lb. .3350- —
50%, tankcars, frt. equald lb. .17 - —
Lactic acid, tech., 88%, tankcars, frt. equald. lb. .2750- —
Lactic acid, tech., 50%, tankscars, frt. equald lb. .14 —
NOTE: On the 88% grade, c.l., t.l., drum differential is 2½c. per lb. over tankcars; on the 50% grade the c.l., t.l., differential is 1½c.
Lactose, edible, reg. bgs., c.l., works. .....lb. .18½- —
bgs. 20,000 lb. to c.l., same basis. .....lb. .19 - —
Edible lactose in fib. dms. to 1c. higher
Lactose, ferment grade, bgs., c.l., works. .....lb. .14½- —
Lactose, USP, reg. fib. dms., c.l., t.l., frt. equald. lb. .27½- —
USP, reg. fib. dms., 6,000 to 22,900-lb. lots, frt. equald. lb. .28 - —
USP lactose in bags 1c. lower.
Lactose, USP, spray dried, bgs., t.l., frt. equald. lb. .25½- —
bgs., 6,000 to 22,900 lbs., frt. equald. .. .. lb. .2[illegible] - —
Lake C, red toner, (red 5[illegible] bbls., frt. alld. lb. 1.50 - —
Lanolin, anhyd., cosmetic, 400-lb. dms., works. .....lb. .50 - .5685
pharmaceutical, 400-lb. dms. works. .....lb. .49 - .5565
tech., (under 2% f.f.a.), 400-lb. dms., works. .....lb. .47 - .5565
Hydrous lanolin in 400-lb. dms. is 2c. to 4c per lb. less.
Lard (See Oils, Fats & Waxes market report on page 26).
Lard oil, No. 1, dms., c.l., dlvd. lb. .15¼- —
tanks, same basis. .... .. lb. .13 - —
Lard oil, extra, winter, strained, dms., c.l. ..... lb. .15¼- —
tanks, same basis. ..... lb. .15¼- —
prime, burning, dms., c.l., same basis, Chicago. .....lb. .18 - —
Lard oil, prime, burning, tanks, same basis. .. .. lb. .16 - —
300 Mi. rad. 1¼c. higher, except Texas, 2c., and West Coast, 3c. higher.
Laurent's acid, bbls. lb. .87 —
lb. .18¼- .20¼
Lead, white, basic carbonate, bgs., c.l., frt. alld. .. lb. .2230- —
bgs., l.c.l., same basis lb. .2330- —
Lead, white, basic, silicate, bgs., c.l., same basis .. lb. .19¾- —
bgs., l.c.l., same basis lb. .20¾- —
Lead, white, basic sulfate, bgs., c.l., same basis lb. .21½- —
bgs., l.c.l., same basis . lb. .22½- —
Lecithin, edible, tech., bleached, non ret. dms., l.c.l., works. lb. .14 .15
unbleached, non-ret. dms., l.c.l., same basis lb. .13½- .14½
Lemon oil, Ariz., cold-pressed, dms. lb. 6.95 - —
Calif., USP, dms. .....lb. 6.75 - —
Italian. .. .. lb. 6.00 -11.00
Lemonpeel dried, Spanish, bls lb. .50 —
Lemongrass oil, E. I., cns., dms. lb. 2.20 - 2.45
dl-Leucine, dms., 1 kilo. works, kilo. 50.00 - —
Licorice root, whole, bls. .....lb. .15 - .24
gran., bls. .....lb. .22 - .39
powd., bls. .....lb. .30 - .39
Lignosulfonate (see under Ammonium or Sodium lignin sulfonate).
Lime, chemical, pebble (quicklime), 50,000 lbs., works, E. . ton. 18.00 -19.50
bgs., same basis. .... ton. 23.00 - —
hydrated, bulk, same basis. ton. 19.50 -21.75
bgs., same basis. ..... ton. 25.25 - —
Lime, NF, purif., 100-lb. fib. dms. lb. [illegible] —
Lime oil, dist., Mexican, dms. .lb. 7.70 - 7.75
Haitian, dist., dms.. .....lb. 6.50 - 7.00
expressed, dms. lb. 10.00 -11.00
Lime salts (see Calcium).
d-Limonene, dms. .. lb. .11 - .17
Linalool, ex bois de rose oil, dms., lb. 3.70 5.40
syn., 98-100%, dms., works lb. 2.45 2.75
Linalool oxide, syn., 55-gal. dm. lb. 7.75 —
Linalyl acetate, ex bois de rose oil, 90-92%, dms. .. .. .. lb. 3.45 - 5.05
96-98%, cns. .. .. lb. 5.70 - —
syn., 98-100%, dms., works. lb. 1.85 - 2.10
Linalyl benzoate, syn., 55-gal. dms. lb. 8.00 —
Linalyl cinnamate, syn., 55-gal. dms. lb. 13.35 —
Linalyl formate, syn., 55-gal. dms. lb. 7.75 8.50
Linalyl isobutyrate, syn., 55-gal. dms. lb. 6.50 6.55
Linalyl propionate, syn., 55-gal. dms. lb. 5.65 —
Lindane, 25% formulation, to distributors, dms., frt. alld. lb. .95 —
99.9% tech., f.o.b. Niagara Falls, N.Y., 250-lb. dms. frt. alld., t.l. .....lb. 1.37 - —
same basis, under 2 tons lb. 1.75 - —
Note: Materials shipped in 100-lb. dms are 2c more per pound.
Linden flowers, with leaves, bls. lb. .78 - .85
without leaves, bls. ..... lb. .90 - 1.15
Linseed meal: (See Oils, Fats & Waxes market report on page 26).
Linseed oil, raw, tanks, f.o.b., Minneapolis. ..... lb. .0875- —
tanks, New York. ..... lb. .1021- —
tankwagon, New York. .....lb. .1285- —
Linseed oil fatty acid, dist., dms lb. .2130- .2630
tanks lb. 1[illegible] —
water-white, dms. ... . . lb. .25½- —
tanks ... lb. .23 - —
Litharge, coml., powd., bbls., c.l., works .. .. lb. .18 - —
bbls., l.c.l., same basis lb. .19 - —
Lithium bromide, anhyd., dms., ton lots, dlvd. .....lb. 1.70 - —
sol'n, same basis. .... lb. 1.04 - —
Lithium carbonate, dms., c.l., t.l., dlvd. .. .. .. lb. .54 - —
10,000 lbs. to t.l., same basis. lb. .56½- —

t.l., same basis lb. .18 - .18½
l.c.l., l.t.l., same basis lb. .19½ .22
Magnesium chloride, anhyd., 92%, flake or pebble dms., c.l., works lb. .12¾ —
dms. l.c.l., works lb. .14 .15
Magnesium chloride, hydrous, 99%, flake, bgs., c.l., works ton.72.80 - —
bulk, same basis ton.64.00 - —
Magnesium gluconate, 100-lb. dms. f.o.b. works, E. lb. 1.42 - —
Magnesium hydroxide, NF powd., dms., c.l., t.l., works frt. equald. lb. .21 - .29½
Magnesium lauryl sulfate, tanks, f.o.b. works lb. .17½ —
Magnesium metal, 99.8%, ingots, 10,000-lb lots or more, f.o.b. Los Angeles lb. .39 - —
pigs 10,000-lb lots or more works lb. .38¼ —
Magnesium metal, sticks, c.s., works, same basis lb. .57 .59
Magnesium nitrate, tech., flake, 250-lb. dms., t.l., works, lb. .32 - —
Magnesium oxide, USP, light, bgs., c.l., works, frt. equald. lb. .47 - —
t.l., same basis lb. .47 - .47½
l.c.l., l.t.l., same basis lb. .49 .52
heavy, dms., c.l., same basis lb. .47½ —
t.l., same basis. lb. .48 —
l.c.l., l.t.l., same basis lb. .48½ .53
Magnesium oxide, tech. (see Magnesia).
Magnesium phosphate, tribasic, NF dms lb. .75 —
Magnesium silicate (see Talc)
Magnesium silicofluoride, bgs., c.l., t.l., works lb. .10½ —
Magnesium stearate, ctns., c.l., frt. alld lb. .48 - —
ctns., l.c.l., ton lots, same basis. lb. .49 - —
Magnesium sulfate tech. bgs., mixed c.l., 10,000-lb. min., works. 100 lbs. 3.14 - —
USP. cryst., bgs., mixed c.l., 10,000-lb. min., works. 100 lbs. 3.38 - —
Magnesium trisilicate, USP, powd., fib. dms. 5,000-lb. lots lb. .38 —
fib dms., 1,000-lb. lots lb. .40 - —
USP. micronized powd., dms., 375-lb. lots lb. .83 - —
Malathion, tech., dms., c.l., works. lb. .68 .90
dms., l.c.l., works lb. .69 .93
Maleic acid, cryst., powd., dms. lb. .53 - —
Maleic anhydride, bgs., t.l., dlvd. lb. .16½ - .18½
tanks, dlvd. lb. .14 - .16
Maleic anhydride in dms. 1c. per lb. higher
Malic acid purif and food grades, 50-lb. bgs., t.l., c.l., dlvd. lb. .33½ - —
50-lb. bgs., 9,600 lbs. or more, same basis. lb. .35 —
Mandarin oil, Italian, dms. lb. 7.25 - 7.75
dom. (Florida tangerine oil). dms. lb. 5.00 - 6.00
Mandelic acid, dms., 1,000-lb. lots. lb. 2.35 —
dms., smaller lots lb. 2.40 2.50
Manganese acetate, dihydrate, dms., dlvd. lb. .36½ - .42½
tetrahydrate, dms., t.l., dlvd. lb. .31 - —
l.t.l., same basis lb. .33 - —
Manganese borate, tech., fib. dms. lb. .23½ - —
Manganese carbonate, chemical grade 46% Mn bgs., 20,000-lb. lots or more, works, lb. .14½ - —
Manganese chloride, anhyd., dms., 20-000-lb lots or more lb. .21 —
Manganese dioxide, nat., African, grd., 70%-76% MnO_2, 100-lb. bgs., c.l., works, ton.82.00 -86.00
84% MnO_2, same basis. ton.132.00 - —

tech., 100-lb. dms., same basis lb. 8.75 -10.51
Mercurous chloride (see Calomel).
Mercury, ammoniated (see White precipitate, USP XV)
Mercury metal, 75-lb. per flask.265.00 -270.00
Mesityl oxide, tanks, dlvd. lb. .14¼ - —
Prices West of Rockies 2c. per lb. higher.
Meta-aminophenol (see m-Aminophenol)
Meta-chloraniline (see m-Chloroaniline).
Metanitroparatoluidine (see m-Nitro-p-toluidine).
Metanitroaniline (see m-Nitroaniline).
Metaphenylenediamine (see m-Phenylenediamine).
Metatoluidine (see m-Toluidine).
Metatolylenediamine (see 2,4-Tolylenediamine).
Methacrylic acid, glacial, 99%, dms., truckloads, frt. equald. lb. .33½ —
tanks works frt. equald lb. .30 —
Methanol, syn., tanks, 4,000 gals., f.o.b. major Eastern plants gal. .11 - —
Methanol syn., tanks, 4,000 gals., f.o.b. Los Angeles terminals, gal. .17 - —
Methapyrilene fumarate, 100-lb dms., any quantity, frt. alld. lb.18.00 - —
Methapyrilene hydrochloride, 100-lb. dms., any quantity, frt. alld. lb.21.25 - —
Methenamine (see Hexamethylenetetramine).
Methionine hydroxyanalogue, 93% min., (calcium salt) bgs., 30,000-lb. lots or more frt. alld. lb. .72 - —
93% min. (calcium salt), bgs., less than 30,000 lbs., frt. alld. lb. .74 - —
dl-Methionine, NF, fib. dms., frt. alld., 1,000 lbs. or more lb. 1.90 - —
dl-Methionine, feed grade, 99% min., imp., c.l., frt. alld. lb. .88 - —
Methoxychlor, 50% wettable powder, dealers, dms., cs. lb. .66 - —
Methyl abietate, non-ret. dms., c.l., dlvd. E. lb. .25½ —
non-ret. dms., l.c.l., same basis. lb. .26¼ - .27
non-ret. dms., t.c.l., same basis. lb. .28¼ - .29
Methyl abietate hydrogenated, non-ret. dms., l.c.l., same basis. lb. .28¼ - .29
Methyl acetone, nat., dms., l.c.l., E. of Miss., frt. alld. gal. .62½ —
Methyl acetone, syn., tanks, frt. alld. E. gal. .44½ —
Syn. methyl acetone, East territory comprises all states East of and including Colo., Mont., N. Mex., and Wyo. West territory is made up of all states West of those four.
Methyl acrylate, tanks, dlvd. lb. .20 - —
Methyl alcohol (see Methanol)
Methyl amyl acetate, tanks, dlvd. E. lb. .14¼ - —
Methyl amyl alcohol, tanks, dlvd. lb. .16 - —
N-Methylaniline, tech., tanks, frt. alld. lb. .73 - .78
Methyl anthranilate, dms. lb. 2.15 - 2.35
Methyl benzoate, dms., t.l., lb. .63 - —
Methyl bromide, dist., tanks, 140,000 lbs. min., frt. alld. lb. .34 - —
Methyl n-butyl ketone, tanks, 40,000-lb. min., dlvd. lb. .14½ —
Methyl cellulose premium, (vis. 1,500-4,000 cps.), 50-lb. bgs., c.l., dlvd. lb. .89 - —
premium, hydroxypropyl, (vis. 50-15,000 cps.), 50-lb. bgs. c.l., dlvd. lb. .89 - —
Methyl cellulose, standard, (vis 15-400 cps.), 50-lb. bgs., c.l., dlvd. lb. .77 - —

A-159

A-160

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

- against -

AMTRACO CORP.,

Defendant.

AMENDED OPINION

72 Civ. 2441

- -x

A P P E A R A N C E S :

FOX GLYNN & MELAMED
Attorneys for Plaintiff
299 Park Avenue
New York, New York 10017
By: JOHN R. HORAN, ESQ.,
Of Counsel

LIEBMAN, BULAU, ROBINSON & PERLMAN
Attorneys for Defendant
32 East 57th Street
New York, New York 10022
By: LAWRENCE M. ROSENSTOCK, ESQ.,
Of Counsel

KNAPP, D.J.

Defendant has moved for an order amending this Court's Findings of Fact and Conclusions of Law dated January 26, 1976 on the principal ground that because of an error made in determining the post-breach market price of lactose, we reached an incorrect conclusion with respect to plaintiff's damages. After reviewing the papers submitted on this motion and re-examining the evidence introduced at trial, we are constrained to agree with defendant and grant its motion to the extent indicated below.

At the outset, we must observe that our initial reading of Wurlitzer Co. v. Oliver (W.D. Pa. 1971) 334 F.Supp. 1009 left us with the apparently erroneous impression that the Court was there placing the burden of proof with respect to mitigation of damages upon the plaintiff. This misapprehension was due in part to the language (appearing at 1012) "the second burden which the plaintiff must fulfill is to demonstrate . . . the extent of its damages" (emphasis supplied). From that language, we concluded that the first burden - that of demonstrating mitigation [1/] - also fell on the plaintiff. We accordingly cited Wurlitzer in support of our conclusion that the burden of proof as to the propriety of the resale method was on plaintiff. Slip Opin., at 5.

Upon reconsideration, we must concede to having misread

the decision. Closer analysis discloses that the Court deemed such burden satisfied by a presumption of propriety and that it was up to the defendant tc present evidence to rebut such presumption. Consequently, Wurlitzer cannot be said to stand for the proposition for which we earlier cited it.

Nevertheless, we are constrained to adhere to our conclusion that the burden of proof with respect to mitigation under Section 2-706 of the UCC rests on the party seeking to avail itself of the higher measure of damages afforded by that section.[2/] The less favorable, common-law, measure of damages - namely, the difference between the contract price and the market price at the time of breach - is still available under Section 2-708 of the U.C.C. Under the common law at least, the burden is and was clearly on the defendant as the defaulting buyer to demonstrate that the seller (plaintiff) failed to mitigate his damages. See Cornell v. T.V. Development Corp. (1966) 17 N.Y.2d 69, 268 N.Y.S.2d 29, 215 N.E.2d 349, on rem., 50 Misc.2d 422, 270 N.Y.S.2d 45, Losei Realty Corp. v. City of New York (1930) 254 N.Y. 41, 171 N.E. 899. Since §2-708 simply restates the common law, we would assume that the burden thereunder would be the same.

The present plaintiff, however, seeks to avail itself of the more generous measure of damages provided by U.C.C. §2-706, which measure is available only if two conditions precedent are met: the resal

must have been made (a) "in good faith", and (b) "in a commercially reasonable manner". It seems to us that where a statute confers a benefit on condition that certain acts are performed, the party claiming the benefit should bear the burden of establishing that he has indeed met the required conditions. At least one commentator is in accord with this view. See Anderson, Uniform Commercial Code, §2-706: 8(1971)[3]. We have already concluded that plaintiff had, at the close of its case, failed to bear this burden. Slip Opin., at 6.

We had thought, however, that defendant had supplied the missing element by its own evidence which, as we viewed it, established that the post-breach market price for edible lactose was "significantly below" the contract price (id. at 6). We are now persuaded - and plaintiff concedes - that we misinterpreted the pertinent evidence. Indeed, defendant's Exhibit WWW and the testimony of the witness Najda clearly suggest that such market price, when converted from pounds to kilos and even taking into account domestic market fluctuations and the age of the lactose involved, was higher than the contract price during the period immediately after the breach.

There thus being no proof that the market price was lower than the contract price, we are left with the situation we found ourselves in by the close of plaintiff's case: with insufficient proof by plaintiff of its efforts to resell in a "commercially reasonable"

manner.

In brief, since the evidence does not establish that the market price was lower than the contract price at the time of breach and since plaintiff did not demonstrate that it resold in a "commercially reasonable" manner, we must conclude that plaintiff failed to establish entitlement to any damages under either §2-708 or §2-706.

Nor can we accept plaintiff's contention that defendant impliedly authorized plaintiff's method of resale by leading it to believe in its post-breach negotiations that defendant still considered the contract viable and that plaintiff was therefore justified in keeping the lactose in storage. The telex communications upon which plaintiff relies do not support - indeed, they are inconsistent with - any such conclusion. Each telex contains a disclaimer making abundantly clear defendant's position that no contract existed between the parties,[4/] and the entire telex communication can only be interpreted as an attempt by defendant to negotiate and settle the dispute arising out of plaintiff's contrary position. These telexes cannot be interpreted as a request - or authorization - that plaintiff maintain the lactose in storage.

In summary, we find that plaintiff has established liability but has failed to show damages. The defendant is directed to prepare an appropriate judgment. Costs are to be borne equally by the

A-165

respective parties.

SO ORDERED.

Dated: New York, New York

May 11, 1976.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/ In the context of this case, we are using the term "mitigation" as a shorthand method of referring to resale in a "commercially reasonable" manner.

2/ The Wurlitzer case was the only Code case cited by plaintiff in support of its contention that the burden rests on the defendant and our research has revealed no other case directly on point. The two cases cited by the Wurlitzer court are inapposite: Atl. C. T. & R. Corp. v. Southwark Foundry & Machine Co. (1927) 289 Pa. 569, 577, 137 A. 307,810 was a case arising under the Uniform Sales Act, a precursor to the more liberal provisions of the Uniform Commercial Code; Old Colony Trust Co. v. Penrose Industries Corp. (E.D. Pa. 1968) 280 F.Supp. 698, aff'd, 398 F.2d 310 (3d Cir. 1968) involved the sale of stock pledged as collateral and was governed by Article 9 of the U.C.C.

3/ One treatise, however, has interpreted the language in §2-706 thusly,

> "In essence, the only defense that the buyer could assert . . . is to show at first some factual basis for the claim that the resale was not conducted in a commercially reasonable manner". Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, §13.05[4] at p. 13-67 (1974).

From this we would gather that the authors would place the burden of proof here in question on the defendant. When applied to the facts of the instant case, the inequity of such a rule becomes readily apparent. Thus it is the plaintiff - and not the defendant - who has the peculiar ability to demonstrate the competence of Mr. Silverman, to outline the details of any efforts he may have made to resell the lactose, and to describe the nature and amount of any offers to buy that may have been made in the interim. The defendant, on the other hand, would be ill-equipped to prove such facts, which are within the exclusive province of the plaintiff.

4/ For example, "although we have no contractual dealings with you . . ." (2/3/72), "without any admission that we are legally obligated to make any proposal" (5/24/72), "with all customary disclaimors [sic] previously stated" (6/2/72), and "without prejudice to our mutual rights" (6/6/72).

Knapp, J.

A-167

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
JUN 21 1976
S.D. N.Y.

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

- against -

AMTRACO CORPORATION,

Defendant.

JUDGMENT

72 Civ. 2441 (WK)

This action having been duly tried before the Honorable Whitman Knapp on July 9, 1975, and the Court's memorandum decision and order having been duly filed on January 27, 1976, and the Court's amended decision and order having been duly filed on May 20, 1976, and such memorandum decision and amended decision having constituted the Court's findings of fact and conclusions of law, it is

On motion of Liebman, Eulau, Robinson & Perlman, attorneys for defendant Amtraco Corporation,

ORDERED AND ADJUDGED:

1. Defendant, Amtraco Corporation, is deemed liable to plaintiff, Bank Fur Gemeinwirtschaft Aktiengesellschaft.

2. Plaintiff, Bank Fur Gemeinwirtschaft Aktiengesell-

MICROFILM
JUN 02 1976

BEST COPY AVAILABLE

schaft shall recover no damages against defendant, Amtraco Corporation; and

3. Each party to bear its own costs. ~~The cost incurred in this action shall be borne equally by the plaintiff and defendant~~.

Dated: New York, New York
June 1, 1976.

U.S.D.J.

JUDGMENT ENTERED - 6/1/76
Raymond F. Burghardt
CLERK

A-169

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff,

-against-

AMTRACO CORPORATION,

Defendant.

NOTICE OF APPEAL

72 Civ. 2441 (WK)

S I R S:

PLEASE TAKE NOTICE that the plaintiff, Bank Fur Gemeinwirtschaft Aktiengesellschaft, hereby appeals to the United States Court of Appeals for the Second Circuit from the second decretal paragraph of the judgment entered in this court on June 1, 1976, which denied plaintiff's recovery of damages against defendant, Amtraco Corporation.

Dated: New York, N. Y.

June 30, 1976

Yours, etc.

Fox Glynn & Melamed
Attorneys for Plaintiff
299 Park Avenue
New York, N. Y. 10017
Tele: (212) 593-6600

TO: Liebman, Eulau, Robinson & Perlman
Attorneys for Defendant
32 East 57 Street
New York, N. Y. 10022

A-170

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT, Plaintiff, -against- AMTRACO CORPORATION, Defendant.	NOTICE OF CROSS-APPEAL 72 Civ. 2441 (WK)

S I R S:

PLEASE TAKE NOTICE that the defendant, Amtraco Corporation, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the first decretal paragraph of the judgment entered in this Court on June 1, 1976, which deemed defendant Amtraco Corporation liable to plaintiff.

Dated: New York, N. Y.
July 6, 1976

LIEBMAN, EULAU, ROBINSON & PERLMAN

By a member of the firm
Attorneys for Defendant
32 East 57th Street
New York, N.Y. 10022
Tel. No. (212) EL 5-5522

TO:

FOX GLYNN & MELAMED, ESQS.
Attorneys for Plaintiff
299 Park Avenue
New York, N. Y. 10017

JUL 08 1976

Received By
FOX GLYNN & MELAMED

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JEFFELY SHEVITZ, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 40-19 88 Oak Wood Haven NY 11421.

That on the 30 day of AUGUST 1976, deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copies of same with a duly authorized person at their designated office.

By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

LIEBMAN EULAU ROBINSON & PEARLMAN
ATTORNEYS FOR DEFENDANT-APPELLEE APPELLANT
32 EAST 57th ST.
NEW YORK, N.Y. 10022

Jeff Elyshevitz

Sworn to before me this
30 day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978